



Lakehead
LAW JOURNAL
Volume 3 Issue 1

**Indigenous Constitutionalism Beyond
Section 35 and Section 91(24):
The Significance of First Nations
Constitutions in Canadian Law**

by Alex Geddes

**Diminishing Strictness: The Growing
Gap in Ontario's Private Law
Environmental Liability Regime**

by Greg Bowley

**Returning The Rice to the Wild:
Revitalizing Wild Rice in the Great
Lakes Region Through Indigenous
Knowledge Governance and
Establishing a Geographical Indication**

by Sara Desmarais

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INDIGENOUS CONSTITUTIONALISM BEYOND SECTION 35 AND SECTION 91(24): THE SIGNIFICANCE OF FIRST NATIONS CONSTITUTIONS IN CANADIAN LAW

Alex Geddes

CONTENTS

I	Introduction	2
II	The Legal Sources Of Legitimacy: Do Indigenous Constitutions Draw Their Legitimacy From Crown-controlled Sources Or Are They Manifestations Of An Inherent Right?	3
A.	The Dangers Of Grounding Legitimacy In Legislation	4
B.	The Constitutional Protection Of Section 35 Of <i>The Constitution Act</i> , 1982	5
C.	The Untested Legitimacy Of An Inherent Right Of Self-governance Based On Indigenous Traditions	8
III	The Content Of The Constitution: What Do Indigenous Constitution-drafters Prioritize?	11
A.	The Dangers Of Constitutional Citizenship Codes	11
B.	The Act Of Writing Predominantly Oral Legal Traditions	15
IV	The Legal Consequences: How Have Canadian Courts Responded To Indigenous Constitutions?	16
A.	Judicial Deference For Constitutional Provisions Regarding Local Affairs	16
B.	The Likelihood of a Negative Reaction to “activist” Constitutions	18
V	Conclusion	20

First Nations communities in Canada have been drafting their own constitutions for many years, but these documents have not received significant attention from Canada’s legal community. The constitutions written by First Nations communities raise many legal questions. This paper addresses three of those questions: (1) From what source do First Nations constitutions draw their legitimacy (Canadian legislation, the Canadian constitution, or an inherent Indigenous source)? (2) What aspects of Indigenous self-governance do they address? (3) How have Canadian courts treated them? This paper examines three Indigenous constitutions that are demonstrative of trends in Indigenous constitution-drafting to answer those three questions. The three example constitutions, judicial considerations of these documents, and jurisprudence about Indigenous self-governance reveal two conclusions. These constitutions are better tools than the *Indian Act* for governing relations between Indigenous peoples and the Canadian Crown. However, they run into many of the same issues that most attempts by First Nations communities have in their push for greater self-governance, since

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Canadian courts are only willing to show limited deference to these documents that purport to outline the fundamental principles of the communities who write them.

I INTRODUCTION

Over the past twenty years, First Nations communities across Canada have been drafting and ratifying their own constitutions. That trend will continue, as many Indigenous groups are in the process of writing these documents, and they are an essential part of the modern treaty process in Canada. Today, the Government of Canada views an Indigenous community having a constitution in place as an important aspect of any negotiations around self-governance.¹ The driving forces behind the creation of these constitutions are Indigenous peoples' desire to exert greater self-determination through self-governance and the need to replace Canada's *Indian Act*² as the primary tool shaping relations between Indigenous peoples in Canada and the Canadian Crown. As these Indigenous constitutions³ assume a greater role in regulating those relations, their legal nature will face increased scrutiny.

Of the constitutional documents that various First Nations have ratified or written, this analysis focuses on three that are representative of trends within Indigenous constitution-writing. The first is the *Gichi-Naaknigewan of Nipissing First Nation* (Ontario).⁴ The *Gichi-Naaknigewan* is the first constitution ratified in Ontario—it is one of the most recent of its kind in Canada, and it embodies modern trends in constitution-drafting. The second is the

¹ K Gover, *Tribal Constitutionalism: States, Tribes, and the Governance of Membership* (Oxford: Oxford University Press, 2010) at 73; Indigenous and Northern Affairs Canada, *The Government of Canada's Approach to Implementation of the Inherent Right and the Negotiation of Aboriginal Self-Government* (2010), online: <<http://www.aadnc-aandc.gc.ca/eng/1100100031843/1100100031844#ext>>.

² RSC 1985, c I-5 [*Indian Act*]. John Borrows adds that Indigenous communities may enact constitutions so other governments appreciate the basis of their law-making authority. J Borrows, *Canada's Indigenous Constitution* (Toronto: University of Toronto Press, 2010) at 182.

³ The use of the term “Indigenous constitution” to describe the documents discussed in this paper raises two questions that are beyond the scope of the paper. First, what is a “constitution”? This paper uses the *Oxford English Dictionary's* definition that a constitution is “the system or body of fundamental principles according to which a nation, state, or body politic is constituted or governed” (*The Oxford English Dictionary*, 2nd ed, *sub verbo* “constitution”), and the emphasis is on written declarations of those fundamental principles. Second, what does it mean to impose the idea of a written “constitution” on First Nations who often have little cultural antecedents for such documents? Val Napoleon cautions against “imposing western legal ideas onto Indigenous societies” (V Napoleon, “Thinking about Indigenous Legal Orders” (2007), online at 2: National Centre for First Nations Governance <http://fngovernance.org/ncfng_research/val_napoleon.pdf>); according to her, Indigenous legal traditions have been recorded in other sources like place names and practices (*ibid* at 13). Therefore, using constitutions may be an attempt to impose a foreign legal constraint on Indigenous peoples. Or perhaps a First Nation has a cultural antecedent for a constitution, but it comes in a different form and from a different worldview than the *OED's* understanding of the nature of a constitution. If a constitution is a master narrative for a society, should a First Nation be forced to use the written constitution form for maintaining its fundamental principles? Although this paper focuses on the practical (First Nations are writing what they call constitutions and using them for governance purposes), those larger theoretical questions (what is a constitution and how should they feature in Indigenous self-governance?) remain in the background of this analysis.

⁴ *Gichi-Naaknigewan of Nipissing First Nation* (2014), online <<http://www.nfn.ca/constitution.php>> [*Nipissing Gichi-Naaknigewan*].

Constitution of the Ta'an Kwäch'än Council (Yukon).⁵ This document is two years older than the *Nipissing Gichi-Naaknigewan* and it illustrates the unique constitution-building process in Yukon. The third is the *Constitution of the Nisga'a Nation* (British Columbia).⁶ This constitution is one of the oldest in Canada (ratified in 1998). It remains relevant because it shows some of the outdated ways in which these documents were once drafted and because it has received judicial consideration on multiple occasions. These three examples provide a snapshot of the positive and negative aspects of Indigenous constitutions, they reveal trends in the evolution of constitution-writing, and they offer insight into how Canadian courts may respond to them.

These three constitutions highlight the fact that these documents are positive steps in improving relations between Indigenous peoples in Canada and the Crown because they are Indigenous-created alternatives to the *Indian Act*. However, Indigenous constitutions have failed to significantly strengthen Indigenous self-governance. They have failed because the Crown continues to exert ultimate control over the role of these documents through the workings of Canada's legal framework. Regardless of how the drafters word them, Canada's legal system views these documents as subservient to Canada's laws and will rein in any attempts to have them take on any role that purports to oust the Canadian legal system.

An evaluation of three issues related to Indigenous constitutions illustrates the successes of these documents in replacing the *Indian Act* and their failures as a tool to assert greater self-governance. First, what are the legal sources of legitimacy in which drafters and courts have attempted to ground Indigenous constitutions? Second, what have First Nations bands emphasized in these documents, and what are the legal implications of those choices? Third, how have Canadian courts interpreted the legal effects and consequences of these constitutions? All three of these questions highlight the fact that these constitutions are positive replacements to the *Indian Act* and can assist First Nations in building their capacity to govern; however, they are weak tools for greater self-governance since the Crown and Canadian courts control their relevance.

II THE LEGAL SOURCES OF LEGITIMACY: DO INDIGENOUS CONSTITUTIONS DRAW THEIR LEGITIMACY FROM CROWN-CONTROLLED SOURCES OR ARE THEY MANIFESTATIONS OF AN INHERENT RIGHT?

The first step in uncovering the value of Indigenous constitutions is to examine the source from which they derive their legitimacy. There are three potential places to ground their legal legitimacy. They could derive it from the federal legislation that accompanies modern treaty

⁵ *Constitution of the Ta'an Kwäch'än Council* (2012), online <<http://taan.ca/legal-and-regulatory/constitutions/>> [*Ta'an Kwäch'än Constitution*].

⁶ *Constitution of the Nisga'a Nation* (1998), online <<http://www.nisgaanation.ca/legislation/constitution-nisgaa-nation>> [*Nisga'a Constitution*].

agreements between the Crown and Indigenous peoples.⁷ Alternatively, the constitutions could be a part of the Aboriginal right to self-governance that is protected by Section 35 of the *Constitution Act, 1982*.⁸ Either of these approaches would respect positivist perspectives on the nature of law since Indigenous constitutions would fit into the legal hierarchy of centralized authority and sovereign command, with Canada's constitutional documents dominating. However, there are pitfalls to grounding Indigenous constitutions in the Canadian legal system, because this approach rests on the assumption that European legal traditions were "received" in Canada and that Indigenous legal traditions are of secondary value.⁹ Finally, their legitimacy could come from within Indigenous communities, as these constitutions could draw upon an inherently Indigenous right to govern. This perspective is, according to John Borrows, a more complete portrait of the legal picture in Canada and avoids labelling Indigenous traditions as inferior.¹⁰ Resolving the issue of where their legitimacy comes from has consequences for how Canada's legal framework understands the nature of these constitutions.

A. The Dangers Of Grounding Legitimacy In Legislation

One possible source of legitimacy for Indigenous constitutions is Canada's legislative framework. They could have the same authority as federal legislation in Canada. This appears to be a logical choice as these documents often accompany federal legislation encapsulating the terms of modern land-claims agreements between the First Nation involved and the Crown, and one of their primary intended purposes is to displace another piece of federal legislation, the *Indian Act*. Historically, the Canadian Crown has claimed it has the constitutional power to legislate Indigenous peoples,¹¹ and the *Indian Act* was the primary tool it used to do so. The modern land-claims treaty process is a new tool for the Crown, though the *Indian Act* continues to dominate Crown-Indigenous relations. These constitutions are key aspects of that modern treaty process, so it seems a natural fit that they would have the same power as the *Indian Act* they are replacing.

Turning to the example constitutions, the *Nisga'a Constitution* appears to treat itself as having power equal to a Canadian statute. The evidence of this interpretation comes

⁷ For the Nisga'a, the relevant agreement is the *Nisga'a Final Agreement Act*, SC 2000, c 7. For the Ta'an Kwäch'an, the *Yukon First Nations Self-Government Act*, SC 1994, c 35 is the relevant agreement. The Nipissing do not yet have a treaty agreement. These pieces of legislation fall within the category of what Borrows calls "recognition legislation" (Borrows, *supra* note 2 at 181-185).

⁸ *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [CA, 1982].

⁹ Borrows, *supra* note 2 at 13-14. Borrows views this grounding of all legal legitimacy in colonization as "a fiction that continues to erase Indigenous legal systems as a source of law in Canada" (*ibid*). He opposes positivist grounding of Indigenous law (*ibid* at 48).

¹⁰ *Ibid*. Borrows's logic appears to endorse the use of treaty processes (of which written constitutions are a part) to place Indigenous legal traditions, and Canadian law more generally, on firmer ground (*ibid* at 20-21). He cites land claims agreements (like those in British Columbia and Yukon) as an effective place for solidifying the validity of Indigenous legal traditions (*ibid* at 52-55). Another possibility is that Indigenous constitutions could derive their legitimacy from international law (for instance, via the *United Nations Declaration on the Rights of Indigenous Peoples*). However, the same questions would arise about whether Canada implements the international law rights of Indigenous peoples or if First Nations in Canada see this as their own inherent right.

¹¹ *Constitution Act, 1867* (UK), 30 & 31 Vic, c 3, reprinted in RSC 1985, Appendix II, No 5 [CA, 1867].

from within the constitution itself. Sections 6 and 7 of the *Nisga'a Constitution* highlight its subordination to Canadian laws:

6. The Constitution of the Nisga'a Nation
 - (1) This Constitution is the supreme law of the Nisga'a Nation, subject only to:
 - (a) the Constitution of Canada, and
 - (b) the Nisga'a Treaty, which sets out the authority of Nisga'a Government to make laws
 - (2) The Canadian Charter of Rights and Freedoms applied to Nisga'a Government in respect of all matters within its authority, bearing in mind the free and democratic nature of Nisga'a Government
7. Validity of Nisga'a Laws

The validity of Nisga'a law may be challenged in the Supreme Court of British Columbia.¹²

In these sections, the drafters' goal appears to be ensuring clarity about how Nisga'a people and Canadian courts will interpret the constitution as it outlines exactly where the document fits into the Canadian legislative framework and it grants Canadian courts the right to rule on internal Nisga'a laws. This approach of respecting Canadian law and Indigenous law reflects Ken Coates's advice that replacing the *Indian Act* is a process that requires certainty for the Indigenous people involved and continuity in the relationship with the federal government.¹³

The problem with this approach is that the Canadian government can overturn legislation. As an example, by drafting the *Nisga'a Constitution* in a way that subordinates it to the federal legislation that accompanies the constitution, the drafters gave Canada's Parliament full power to alter and undermine it. Canada has total control over the legal relevance of these constitutions in Canadian law, but that power structure likely does not reflect the intentions of the Canadian government or the Indigenous signatories of modern treaties.¹⁴

B. The Constitutional Protection Of Section 35 Of *The Constitution Act, 1982*

Fortunately, Canadian courts have rejected the possibility of grounding the legal legitimacy of Indigenous constitutions like that of the Nisga'a Nation in Canadian legislation. Instead, Canadian judges have ruled that the true source of these documents' legitimacy is section 35 of the *CA, 1982*. The *Nisga'a Constitution* is incorporated into the *Nisga'a Final Agreement*

¹² *Nisga'a Constitution*, *supra* note 6, ss 6–7. This subservience reflects the Government of Canada's position that Indigenous self-government agreements "may not deviate from the basic principle that those federal and provincial laws of overriding national or provincial importance will prevail over conflicting Aboriginal laws" (Indigenous and Northern Affairs Canada, *supra* note 1). The *Nisga'a Constitution* does acknowledge the continued importance of Nisga'a legal traditions in its preamble, but that provision is overwhelmed by references to the Canadian legal order.

¹³ K Coates, "The Indian Act and the Future of Aboriginal Governance in Canada" (2008) at 11, online: National Centre for First Nations Governance <http://fngovernance.org/ncfng_research/coates.pdf>.

¹⁴ Borrows draws parallels between the growth of civil law traditions in Canada and Indigenous law. According to him, Quebec's *Civil Code* was at one time treated like an ordinary statute, but it has grown in influence since 1975 (Borrows, *supra* note 2 at 114). Perhaps Indigenous constitutions could follow a similar trajectory in which they seem to be mere statutory replacements for the *Indian Act* but grow in stature over time (*ibid* at 116).

Act,¹⁵ and Canadian courts have evaluated the legal legitimacy of that *Act* in two key decisions: *Campbell v British Columbia*¹⁶ and *Sga'nisim Sim'augit v Canada*.¹⁷ In *Campbell*, members of British Columbia's government challenged the *Nisga'a Final Agreement Act*. Their argument was that the *Act* bestowed legislative power on the Nisga'a Nation, and this violated the Canadian constitution primarily because the *CA, 1867* divided all legislative authority between the Canadian government and the provincial governments. However, the British Columbia Supreme Court determined that the agreement is constitutionally valid because its legitimacy comes from Canada's constitution. The Court found that "Section 35 of the *Constitution Act, 1982*, then, constitutionally guarantees, among other things, the limited form of self-government which remained with the Nisga'a after the assertion of sovereignty. The Nisga'a Final Agreement and the settlement legislation give that limited right definition and content."¹⁸ This decision highlights the fact that Indigenous constitutions have greater importance than other pieces of federal legislation. Although this constitution was also in federal legislation, its power lies in the Aboriginal right of self-governance that is protected by the *CA, 1982*.

In *Sga'nisim*, the British Columbia Court of Appeal reached the same conclusion. The challenge to the constitutional validity of the *Nisga'a Constitution* in that case came from within the First Nation. Chief Mountain, the Nisga'a hereditary chief, made the same arguments about the legality of the document. He challenged it because he felt that the Canadian government was favouring some members of the community and leaving the entire community with little protection.¹⁹ However, the Court of Appeal endorsed a similar analysis to that in *Campbell*.²⁰ The Supreme Court of Canada gave further credence to this understanding when it dismissed Chief Mountain's attempt to appeal the Court of Appeal's decision. The courts expressed reservations about the limits of Indigenous self-governance in both these cases.²¹ At the same time, they suggest that modern treaties and the documents that accompany them will receive constitutional protection in Canadian courts. Thus, Indigenous constitutions draw their legitimacy in the eyes of Canadian law from the *CA, 1982*.

Since the enactment of the *Nisga'a Constitution* in 1998, other drafters of Indigenous constitutions have embraced the understanding that these documents have a home within the Canadian constitution as manifestations of an Aboriginal right of self-governance. However, this understanding produces some tension, because it means Indigenous constitutions are still reliant on the Canadian legal framework. Other constitutions have struggled to try to navigate this tension. For example, the Ta'an Kwäch'än in Yukon attempted to assert the

¹⁵ *Supra* note 7.

¹⁶ *Campbell v British Columbia (Attorney General)*, 2000 BCSC 1123 (CanLII), [2000] 4 CNLR 1 [*Campbell*].

¹⁷ *Sga'nisim Sim'augit (Chief Mountain) v Canada (Attorney General)*, 2013 BCCA 49 (CanLII), [2013] 2 CNLR 226; leave to appeal to SCC refused, 35301 (22 August 2013) [*Sga'nisim*].

¹⁸ *Supra* note 16 at para 181. See the text below accompanying notes 31–35 for more on the potential of the doctrine of residual sovereignty.

¹⁹ J Weston, "Sovereignty without Referendum: Chief Mountain Speaks on Bay Street" (2003) online: The Empire Club of Canada <<http://speeches.empireclub.org/62767/data?n=4>>.

²⁰ *Supra* note 17 at para 81.

²¹ As discussed below at note 26, the primary reservation is that Aboriginal rights under the constitution can be infringed in many contexts.

band's self-reliance while still making their constitution fit into Canadian legal norms.²² In its preamble, it states

[w]e, the citizens of the Ta'an Kwach'an, *by virtue of our inherent rights as provided by the Creator and acknowledged in our Final and Self Government Agreements*, and desiring to assume and exercise full responsibility for our own well-being and to safeguard the lands and resources of our traditional territory for ourselves and our children, our grandchildren and all future generations, adopt this Constitution.²³ [emphasis added]

With its word choices, the *Ta'an Kwäch'än Constitution* stakes multiple claims from which it derives its legal legitimacy. First, it affirms that the Crown has a role to play in the recognition of this constitution because it references the Final and Self Government Agreements, which are treaties between the Ta'an Kwäch'än and the Crown. Second, it also asserts an inherent right to self-governance by claiming those agreements simply recognize the First Nation's right to self-govern that comes from the Creator.

Grounding the legitimacy of the *Ta'an Kwäch'än Constitution* in the Canadian constitution (through the references to the Final and Self Government Agreements) may be a positive step toward ensuring these constitutions enable Indigenous groups to assert self-governance and throwing off the shackles of the *Indian Act*. The constitutional drafters are clear in establishing the constitution's place in the Canadian legal system: It is more important than a mere statute like the *Indian Act* and it is an expression of a right provided for in the *CA, 1982*. This clarity is beneficial for ensuring a court or government knows the constitutional value of the constitution. However, that positive step has a limit, because the Crown can always limit constitutionally protected Aboriginal rights and treaty rights if it meets the justifiable infringement tests set out in *R v Sparrow*²⁴ and *R v Badger*.²⁵ The *Sparrow/Badger* test is firmly entrenched in Aboriginal rights jurisprudence. Under this test, the Crown can infringe any Aboriginal right where it discharges its procedural duty to consult, demonstrates a compelling and substantial government objective, and shows that its actions are consistent with its fiduciary duties to the affected First Nation.²⁶ Thus, the constitutional drafters have taken on risk by clearly grounding their constitution in the *CA, 1982*, because it means the Crown can justifiably infringe the *Ta'an Kwäch'än Constitution* and other Indigenous constitutions.

Courts have confirmed this limitation on Indigenous constitutions. The Crown's ability to infringe the Aboriginal right to self-governance and any potential modern treaty rights

²² First Nations in Yukon have an Umbrella Final Agreement with Yukon and the Government of Canada, but each of its 14 First Nations must write their own constitution (Coates, *supra* note 13 at 17).

²³ *Ta'an Kwäch'än Constitution*, *supra* note 5 at Preamble. The reference to the Creator places the legitimacy of this constitution in part in Sacred Law (Borrows, *supra* note 2 at 25–27).

²⁴ *R v Sparrow*, [1990] 1 SCR 1075, 1990 CanLII 104 [*Sparrow*]. According to Borrows, the judicial reasoning in *Sparrow* perpetuates the myth of Indigenous law's inferiority (*supra* note 2 at 18–19).

²⁵ *R v Badger*, [1996] 1 SCR 771, 1996 CanLII 236 [*Badger*].

²⁶ *Sparrow*, *supra* note 24; *Badger*, *supra* note 25; See *Tsilqot'in Nation v British Columbia*, 2014 SCC 44, [2014] 2 SCR 257 for an example of the application of the *Sparrow/Badger* test in action. In that case, the Supreme Court explained that an examination of the Crown's fiduciary duty requires an analysis of a rational connection between the government's goal and the infringement and must determine whether the government measure is minimally impairing and whether the benefits are proportional to the adverse effects of the infringement (para 87).

that facilitate self-governance received judicial attention in the Nisga'a Nation context. The *Campbell* decision warns that "both Aboriginal and treaty rights guaranteed by s. 35 [of the *CA, 1982*] may be impaired if such interference can be justified and is consistent with the honour of the crown."²⁷ If proponents of Indigenous constitutions rely on an Aboriginal right of self-governance emanating from section 35 of the *CA, 1867* for the legitimacy of these constitutions, then these constitutions will be subject to any limits imposed on them by the Crown. This perpetuation of a power imbalance between First Nations and the Crown is likely why subsequent Indigenous constitutions have adopted the aspect of the *Ta'an Kwäch'än Constitution* that relies solely on Indigenous traditions as the source of legitimacy and avoided specific acknowledgements that they are expressions of the Aboriginal right to self-governance.

One example of the risks that arise from viewing the right to self-governance as an Aboriginal right that can be infringed relates to membership codes (as discussed below, membership codes or the power to make laws relating to membership are often included in Indigenous constitutions). If a First Nation developed rules under its constitution to limit membership to only those people living on reserve, the Crown could infringe upon that right. The Crown could do so if it consulted with the First Nation (likely both included and potentially excluded members), made the case that encouraging free movement on and off reserve is a pressing and compelling objective (e.g., to promote band members to engage in seasonal employment in other parts of the country where there is an insufficient labour force), and met its fiduciary duties by balancing the benefits and drawbacks while maintaining a sense of proportionality in its actions. In this hypothetical scenario, it would be possible for any membership section of an Indigenous constitution to be justifiably infringed by an action of the Crown.

C. The Untested Legitimacy Of An Inherent Right Of Self-governance Based On Indigenous Traditions

The *Ta'an Kwäch'än Constitution* received ratification in 2012, and since then other Indigenous groups have taken up the perspective that such documents derive their legitimacy from within Indigenous traditions, not Canadian traditions. The Nipissing First Nation is the first First Nations band in Ontario to adopt a constitution,²⁸ and it has pushed the Indigenous claim to self-governance further than the *Ta'an Kwäch'än Constitution* by making no mention of Canada or Canadian legal traditions in its *Nipissing Gichi-Naaknigewin*. Its preamble reads as follows:

We, the people of the Nipissing First Nation, known as the Nipissings, ordain and establish this Gichi-Naaknigewin as our supreme law in accordance with the values and principles upon which our heritage has existed.

²⁷ *Campbell*, *supra* note 16.

²⁸ "Nipissing First Nation Passes First Ontario Aboriginal Constitution," *CBC News* (2014), online: <<http://www.cbc.ca/news/canada/sudbury/nipissing-first-nation-passes-first-ontario-aboriginal-constitution-1.2505488>>.

By this Gichi-Naaknigewin, we declare and acknowledge the Creator for the gifts of Mother Earth, sovereign rights to govern ourselves and for our cultural heritage.²⁹

The *Nipissing Gichi-Naaknigewin*'s reference to the Creator as the source of the power to govern is reminiscent of the *Ta'an Kwäch'än Constitution*. However, unlike its Yukon counterpart, the *Nipissing Gichi-Naaknigewin* makes no mention of any legal documents or treaties with Canada; it relies exclusively on an inherent right to govern that comes from within their own tradition. This approach reflects the claim by Kiera Ladner that Indigenous peoples have always retained their "constitutional orders," and any historical treaties or agreements with newcomers to Canada strengthened those Indigenous constitutional orders.³⁰ Ladner's vision of Indigenous constitutionalism is likely more reflective of what an inherent right to self-governance could be rather than what it actually is today, but it is a vision of an inherent right to self-governance that would cause a shift in the existing legal order in Canada. In this way, the *Nipissing Gichi-Naaknigewin* creates a legal question that no Canadian court has yet ruled upon.

Part of the reason for the aggressive claim for Indigenous self-governance in the *Nipissing Gichi-Naaknigewin* is the fact that the Nipissing do not yet have a modern treaty. The drafters of both the *Ta'an Kwäch'än Constitution* and the *Nisga'a Constitution* wrote their constitutions in the context of completed treaty negotiations with the Crown. In contrast, the Nipissing do not have a modern treaty with the Crown. However, their constitution could still have legitimacy under Canadian law without a treaty in place and without relying on a constitutionally protected Aboriginal right to self-governance. The Nipissing could exercise an inherent right to self-governance through the *Nipissing Gichi-Naaknigewin* by relying on the doctrine of residual sovereignty to lend legitimacy to its constitution.

The doctrine of residual sovereignty comes from Binnie J's concurring judgment in *Mitchell v Canada (MNR)*.³¹ That case dealt with whether members of the Akwesasne community could cross the Canada–US border with goods for trade and use. The majority took an orthodox view on Aboriginal rights and based its decision on the principle that Indigenous laws and interests were absorbed by Canadian law; section 35 of the CA, 1982 clarified that Indigenous laws became part of the Canadian legal system.³² In a concurring judgment, Binnie

²⁹ *Nipissing Gichi-Naaknigewin*, *supra* note 4 at preamble. As with the *Ta'an Kwäch'än Constitution*, the reference to the Creator grounds legitimacy in sacred law.

³⁰ KL Ladner, "Indigenous Governance: Questioning the Status and the Possibilities for Reconciliation with Canada's Commitment to Aboriginal and Treaty Rights" (2006) at 4, online: National Centre for First Nations Governance: <http://fngovernance.org/ncfng_research/kiera_ladner.pdf>. Borrows strikes a similar tone when he claims that "Indigenous people do not require formal recognition to possess and exercise law" (*supra* note 2 at 181). Napoleon raises a potential red flag for grounding the legitimacy of an Indigenous law (or constitution) in an inherently Indigenous source because there has been a breakdown in Indigenous legal orders; as she says, "in recent times, Indigenous laws have been broken with no consequences . . . When laws are broken with no recourse, the legal order begins to break down and this has been the experience of Indigenous peoples" (Napoleon, *supra* note 3 at 10). However, Napoleon does not consider this a fatal flaw (*ibid* at 11).

³¹ *Mitchell v Canada (MNR)*, 2001 SCC 33 (CanLII), [2001] 1 SCR 911 [*Mitchell*].

³² *Ibid* at para 10.

proposed an alternative suggestion: He thought it possible to analyze the Indigenous interest in that case through the lens of a “merged sovereignty” in which some residual aspects of Indigenous government were not wholly absorbed into the Canadian legal system.³³ Essentially, residual sovereignty is the principle that Indigenous peoples maintained their sovereignty to govern their nations unless the Crown has taken away that sovereignty. It impacts Indigenous constitutionalism because some issues addressed in an Indigenous constitution may be issues for which First Nations retained sovereignty. Thus, the legitimacy of those aspects of the constitution could be dependent on an inherently Indigenous right to govern instead of an Aboriginal right under the *CA, 1982*.

However, the likelihood that Canadian courts would embrace a novel approach using the principle of residual sovereignty is unlikely. As Kent McNeil explains,

[This] approach is the only one that is consistent with the Supreme Court’s acknowledgment of the pre-existing sovereignty of the Aboriginal nations. It also places the onus on the Crown of proving how and to what extent that sovereignty has been reduced, which is where I think the onus should lie as a matter of both legal principle and justice. But given that [this] approach has not yet been explicitly accepted by Canadian courts, I cannot state that it is an expression of Canadian law.³⁴

Residual sovereignty is a popular doctrine in the United States but not in Canada.³⁵ McNeil’s warning suggests that a Canadian court may be unwilling to accept a First Nations constitution like the *Nipissing Gichi-Naaknigewin* as an expression of residual sovereignty. Commentators have argued that Indigenous self-governance needs to evolve slowly to gain acceptance from Canada’s legal system.³⁶ Canadian courts may view the *Nipissing Gichi-Naaknigewin* as an attempt to move the law too quickly.

^{33.} *Ibid* at para 129. Binnie ultimately ruled against recognizing the Indigenous rights asserted in that case. Despite that result, Borrows views this case as a signal that Indigenous law survived European settlement and continues to exist (Borrows, *supra* note 2 at 11, 135–136). As Borrows explains, “Indigenous peoples believe many of their rights were not surrendered by treaties and were not extinguished by clear and plain government legislation . . . They believe that their laws coexist with common law and civil law traditions” (*ibid* at 136). Mark Walters also discusses residual sovereignty or Indigenous sovereignty (M Walters, “‘Looking for a Knot in the Bulrush’: Reflections on Law, Sovereignty, and Aboriginal Rights,” in P Macklem and D Sanderson, eds, *From Recognition to Reconciliation: Essays on the Constitutional Entrenchment of Aboriginal and Treaty Rights* [Toronto: University of Toronto Press, 2016] at 35). According to Walters, lower courts in Canada have recognized the idea of residual sovereignty, but the Supreme Court has not gone any further than Binnie’s dissent in *Mitchell* (*ibid* at 38).

^{34.} K McNeil, “The Jurisdiction of Inherent Right Aboriginal Governments” (2007) at 30, online: National Centre for First Nations Governance <http://fngovernance.org/ncfng_research/kent_mcneil.pdf>.

^{35.} The seminal American case on the issue was the US Supreme Court’s decision in *Johnson v McIntosh*, 21 US (8 Wheat) 543 (1823), in which the court stated that Indigenous sovereignty was diminished but not necessarily eliminated by European claims in the New World (Walters, *supra* note 33 at 39).

^{36.} P Macklem, “Normative Dimensions of the Right of Self-Government,” in *Royal Commission on Aboriginal Peoples, Aboriginal Self-Government: Legal and Constitutional Issues* (Ottawa: Ministry of Supply and Services Canada, 1995), 1 at 9–17; JE Dalton “Aboriginal Title and Self-Government in Canada: What Is the True Scope of Comprehensive Land Claims Agreements?” (2006) 22 Windsor Rev Legal Soc Issues 29 at 77; R Missens, “Sovereignty, Good Governance and First Nations Human Resources: Capacity Challenges” (2008) at 1, online: National Centre for First Nations Governance <http://fngovernance.org/ncfng_research/richard_missens.pdf>.

Although the *Nipissing Gichi-Naaknigewin*'s attempt to ground its legitimacy in Indigenous sources without any reference to Canada may raise legal issues that the Canadian legal system is not yet ready to accept, it is equally problematic for Indigenous constitutions to acknowledge their subservience to the Canadian constitution. The wording of the *Nisga'a Constitution* and *Ta'an Kwäch'än Constitution* make it easy for courts to accept those documents as manifestations of the Aboriginal right of self-governance. This source of legitimacy is sufficient for these documents to replace the *Indian Act* as the foundational documents in the relationship between an Indigenous group and the Crown. However, it fails to raise stronger claims for inherent Indigenous rights. Overall, the competing sources from which Indigenous constitutions could derive their legitimacy highlight the challenges facing the drafters of these documents between strengthening Indigenous rights of self-governance while working alongside the Crown and pushing for further Indigenous rights at the expense of the Crown.

III THE CONTENT OF THE CONSTITUTION: WHAT DO INDIGENOUS CONSTITUTION- DRAFTERS PRIORITIZE?

In addition to their sources of legitimacy, the contents of Indigenous constitutions offer insight into the role that the drafters of these documents intend for them to play in the relations between Indigenous peoples in Canada and the Canadian Crown. A review of those contents highlights two issues that stand out: the importance placed on citizenship codes in these constitutions and the difficulty for the drafters to turn legal traditions that come from oral transmission into written constitutions. These two issues arise in the *Nisga'a Constitution*, the *Ta'an Kwäch'än Constitution*, and the *Nipissing Gichi-Naaknigewin*. The choices of the constitutional drafters are demonstrative of the fact that these constitutions fall short in the push for greater autonomy from the Crown for Indigenous peoples in Canada.

A. The Dangers Of Constitutional Citizenship Codes

In all three of these Indigenous constitutions, the drafters address the issue of citizenship or membership in the First Nation. The *Indian Act* historically determined membership in an Indigenous group, and that legislation often completed this task with racist and sexist values. Thus, a key aspect of any Indigenous constitution is the replacement of the problematic rules in the *Indian Act* with rules and regulations around citizenship that the First Nations determine themselves.

Despite the importance of discarding Crown-centric approaches to First Nations band membership, the *Nisga'a Constitution* did not deal with this issue in extensive detail. The *Nisga'a Constitution* simply states the following two points:

8. Citizenship

- (1) Every Nisga'a participant who is a Canadian citizen or permanent resident of Canada is entitled to be a Nisga'a citizen.

- (2) A person who is not a Nisga'a participant and who is a Canadian citizen or permanent resident of Canada may become a Nisga'a citizen if permitted by, and in accordance with, Nisga'a law.³⁷

The language in this clause raises problems because "Canada" is central to the determination of Indigenous citizenship. Limiting Nisga'a citizenship to Canadian citizens creates an artificial barrier that has no historical significance for the Nisga'a community since Canada's borders did not exist when the Nisga'a Nation was formed. In the Nisga'a context, this issue has not caused significant problems, likely because the Nisga'a have not made any cross-border claims. However, the potential problems of such a restrictive citizenship agreement have become a reality in other contexts.³⁸ One example of this issue has arisen in another modern land-claim treaty negotiation in Ontario. Canada, Ontario, and an entity called the Algonquins of Ontario have signed an agreement-in-principle for a modern land-claims agreement in that province; however, this agreement is now in limbo as Algonquin nations based in Quebec have challenged its legitimacy.³⁹ Thus the *Nisga'a Constitution* is flawed because it uses artificial boundaries based on Canadian territorial divisions for assessing citizenship. This approach undermines the goals of the constitution-making process since it creates greater uncertainty for the Indigenous people who live under these constitutions.

As well, the section on citizenship in the *Nisga'a Constitution* is short and does not appear particularly concerned about issues with citizenship. The clause suggests that the Nisga'a can subsequently create laws to determine citizenship without any constitutional guidance. That apparent lack of concern becomes problematic because Canadian courts have struggled to define the relationship between Indigenous self-governance and the right to determine membership.

The best example of Canadian courts' difficulty in grappling with band membership is *Sawridge Band v Canada*.⁴⁰ In the constellation of litigation related to *Sawridge*, a First Nations band took control of its band membership and attempted to exclude some members from the community who would have regained their band membership because of legislative changes to the *Indian Act* (these included women like Elizabeth Poitras, who lost her status because she married a non-Indigenous man). Some individuals, including Poitras, fought for their membership. The bands argued that Canada could not unilaterally impose these changes on them because they have a constitutional right to determine their own membership (either a free-standing right or one that is incidental to their right to self-govern). It would be impossible in this paper to summarize the litigation in the cases related to *Sawridge* for two reasons: (1) The litigation unfolded over 30 years, and (2) there have been many procedural

³⁷ *Nisga'a Constitution*, *supra* note 6, s 8.

³⁸ For example, see the discussion in *Mitchell*, *supra* note 31, where a central issue was the fact that the Akwesasne territory crossed provincial, state, and international borders.

³⁹ Russell Diabo, "Why Ontario's First Modern-Day Treaty Is Set up to Fail" (November 2016), online: TVO <<http://tvo.org/article/current-affairs/shared-values/why-ontarios-first-modern-day-treaty-is-set-up-to-fail>>.

⁴⁰ *Sawridge Band v Canada*, 2006 FCA 228 (CanLII), [2006] 4 CNLR 279 [*Sawridge*]; appeal to the Supreme Court of Canada dismissed, 2007 CanLII 2922.

and substantive decisions (along with interim appeals) since the case began in 1986.⁴¹ However, the Federal Court of Appeal made a statement in one of the most recent interim decisions that is suggestive of a judicial reluctance to examine the question of whether the right to determine membership was a necessary element of the right to self-governance. The Court took the position that it was wise for the Federal Courts to avoid ruling on such an issue if possible. In this case, the Court concluded “it was not incumbent . . . to come to a definitive conclusion on a very difficult issue on which the Supreme Court is yet to pronounce.”⁴² Because the relationship between self-governance and membership is unresolved, a First Nation’s constitution appears to be an ideal place to address this issue. However, the *Nisga’a Constitution*, which was ratified before the *Sawridge* decision, does not provide the kind of clarity necessary to provide strong claims for Indigenous self-governance.

Since *Sawridge*, the Supreme Court of Canada has not provided guidance on what the relationship should be between Indigenous self-governance and citizenship codes. Thus, this task now rests with the drafters of subsequent Indigenous constitutions. The *Ta’an Kwäch’än Constitution* and the *Nipissing Gichi-Naaknigewin* are demonstrative of two opposing ways in which these constitutions have resolved issues around citizenship. The *Ta’an Kwäch’än Constitution* defines a citizen as “a person enrolled as a citizen of the Ta’an Kwäch’än Council pursuant to the citizenship code attached to this constitution.”⁴³ The citizenship code attached to the constitution is a four-page schedule that provides extensive details about who will be a citizen and who will not.⁴⁴ This approach is effective at displacing the *Indian Act* because judicial considerations of the explicit content of the *Ta’an Kwäch’än Constitution* have embraced the constitution’s clear language and upheld its provisions. For instance, in *Harpe v Ta’an Kwäch’än Council*, the Supreme Court of Yukon accepted the provisions of the *Ta’an Kwäch’än Constitution* as binding upon that Court.⁴⁵ Although that case did not deal with the citizenship code, the citizenship code would likely receive similar judicial deference from Canada’s courts because the court in *Harpe* endorsed respecting clear constitutional statements by Indigenous constitutions.

In contrast to the *Ta’an Kwäch’än Constitution*’s extensive citizenship code, the *Nipissing Gichi-Naaknigewin* takes an approach similar to that of the *Nisga’a Constitution* for determining who is Debendaagziwaad (“those who belong”):

Part 9—Nipissing First Nation Debendaagziwaad

9.1 The Nipissing First Nation has exclusive jurisdiction to make laws for determining Debendaagziwaad.

⁴¹ In addition to the myriad articles and comments that analyze the litigation (e.g. K Gover, “When Tribalism Meets Liberalism: Human Rights and Indigenous Boundary Problems in Canada” (2014) 64:2 UTLJ 206; J Borrows, “(Ab)Originalism and Canada’s Constitution” (2012) 58 SCLR (2d) 351), there is an entire book dedicated to the *Sawridge* saga (C Dick, *The Perils of Identity: Group Rights and the Politics of Intragroup Difference* [Vancouver: UBC Press, 2011]).

⁴² *Sawridge*, *supra* note 40 at para 43–44. Although this was an interim decision that left the door open for a court to rule on this issue in the future, it is unlikely that will happen in the *Sawridge* context since the case effectively died in 2012 (Gover, “When Tribalism Meets Liberalism,” *supra* note 41 at 231). The *Sawridge* band lost, but the constitutional question remains open.

⁴³ *Ta’an Kwäch’än Constitution*, *supra* note 5, s 2.1.

⁴⁴ *Ibid*, Schedule I: Ta’an Kwäch’än Council Citizenship Code.

⁴⁵ *Harpe v Massie and the Ta’an Kwäch’än Council #1*, 2005 YSC 54, [2006] 2 CNLR 54 [*Harpe*].

9.2 The Nipissing First Nation Debendaagziwaad Law will set out the eligibility requirements for the determination of Nipissing First Nation Debendaagziwaad, including the mechanism for reviewing Debendaagziwaad decisions.

9.3 The Nipissing First Nation Debendaagziwaad Law will not remove any Debendaagziwaad from the membership list whose names appear on the Nipissing

First Nation Band list on the date that the Debendaagziwaad Law takes effect.⁴⁶

There is no extensive citizenship code in the *Nipissing Gichi-Naaknigewin*. Instead, Part 9 claims that the Nipissing will set rules for determining citizenship.⁴⁷ The key difference between the Nipissing approach and the *Nisga'a Constitution* is that the *Nipissing Gichi-Naaknigewin* makes no mention of Canada or any Canadian territorial boundaries. By doing so, the drafters are sending a clear message that the band does not wish to grant any voice to the Canadian government in determining its membership.

The Nipissing approach pushes First Nations governance into the uncharted waters the Federal Court of Appeal did not wish to venture in *Sawridge*.⁴⁸ By suggesting that the First Nation will have the exclusive authority to determine membership, the Nipissing may set themselves on a collision course with the Crown's desire to meddle in membership rules. Unlike their Yukon counterparts, who attached their membership code to the treaty between themselves and the Canadian government, the *Nipissing Gichi-Naaknigewin* leaves no room for the Canadian government to involve itself in its membership determinations. The only limitation on the power that the Nipissing First Nation claims to wield is the fact that the Nipissing First Nation will not remove anyone from the membership list on the date that the Debendaagziwaad takes effect. This provision seems to be an attempt to assuage fears that members of the community would lose their citizenship when the *Nipissing Gichi-Naaknigewin* assumes a primary role in Nipissing law. The conflict between Canada's historical desire to involve itself in conversations about First Nations membership, as evidenced by its resistance in *Sawridge*, and the Nipissing claims is exactly what John Borrows explains is a necessary conflict that will lead to the revitalizing of Indigenous legal traditions.⁴⁹ It remains to

⁴⁶ *Nipissing Gichi-Naaknigewin*, *supra* note 4, s 9.

⁴⁷ The *Nipissing Gichi-Naaknigewin* also makes no mention of the *Indian Act*, besides affirming that anyone who has membership in the Nipissing First Nation through the *Indian Act* formula at the time it takes effect will keep his or her membership. Section 10 of the *Indian Act* does permit a First Nation band to develop its own membership code (like the *Sawridge* band attempted to do) in accordance with rules set out in that provision, including a vote by band members (s 10(2)). If a band does not exercise its right under section 10, then the Government of Canada maintains and controls membership under the rules set out in section 11. According to Indigenous and Northern Affairs Canada, there are currently 229 bands who use section 10 to define membership, and 38 bands that control membership through "self-government legislation outside of the *Indian Act*" (Indigenous and Northern Affairs Canada, "About Band Membership and How to Transfer to or Create a Band" (June 2018), online: Indigenous and Northern Affairs Canada <<https://www.aadnc-aandc.gc.ca/eng/1100100032469/1100100032470>>).

⁴⁸ Though the ultimate failure of the *Sawridge* band's claims likely sends a negative signal to the Nipissing's approach.

⁴⁹ J Borrows, "Seven Generations, Seven Teachings: Ending the *Indian Act*" (May 2008) at 30, online: National Centre for First Nations Governance <http://fngovernance.org/ncfng_research/john_borrows.pdf>.

be seen how Canada's courts will respond to more aggressive demands for control. However, the *Sawridge* decision suggests the *Nipissing Gichi-Naaknigewin* may be claiming more than Canadian courts are willing to accept.

B. The Act Of Writing Predominantly Oral Legal Traditions

The role of citizenship is central to the value of Indigenous constitutions because it enables people to access the constitutional rights that these constitutions codify. However, the act of codifying the principles that Indigenous communities wish to place in their constitutions is counterintuitive for many of the First Nations who are creating these constitutions. Indigenous legal traditions in Canada are usually contained within the oral tradition of an Indigenous group, so there are concerns about the impact of recording these principles; however, recording these rules is a necessary step toward increasing Indigenous self-governance, and constitutions are an ideal place to do so.⁵⁰ Thus, it is no surprise that Indigenous groups have struggled to record constitutions. In British Columbia, the Gitanyow people revealed that during their constitution-writing “it was a difficult process which lasted for two years, as there was a great deal of concern about the effect of reducing the Gitanyow Constitution to writing—it had functioned well for long, long years in an unwritten form, and [it had] the effect of using Western criteria in evaluating their constitution.”⁵¹ Despite the difficulties that the Gitanyow people expressed, recording these constitutions is an essential step in bridging the gap between Indigenous legal traditions and the Canadian legal system. Written constitutions are necessary for dispensing with the *Indian Act*, but they are also problematic because they force Indigenous peoples to accept foreign methods of transmitting legal traditions.

One example of why recording constitutions is essential for the Crown and for Canadian courts is the case of *Orr v Fort McKay First Nation*.⁵² Orr worked for the Fort McKay First Nation Band, and the band suspended him pending the result of a sexual assault charge. However, the First Nation had an Election Code, and the Election Code did not contemplate removing an employee in this situation. The First Nation tried to claim that it had exercised its inherent rights of governance when suspending Orr. In the end, the court decided the Election Code was clear and the First Nation could not overcome it via a claim to inherent power.⁵³ *Orr* is a challenging situation because it presents both the advantages and disadvantages of a recorded Indigenous law. The advantage in this case is that it prevented the Fort McKay First Nation from exercising its power in an arbitrary way. The First Nation was bound by its own written laws. In theory, a constitution plays the role of avoiding the arbitrary exercise of power, so *Orr* seems to support the idea that constitutions could strengthen Indigenous self-

⁵⁰ A Dewitt, “Judicial Review as a Limit to Indigenous Self-Governance” (2014) 77:1 Sask L Rev 205 at para 26.

⁵¹ AC Peeling, “Traditional Governance and Constitution Making among the Gitanyow” (2004) at 5, online: National Centre for First Nations Governance <http://fngovernance.org/resources_docs/Constitution_Making_Among_the_Gitanyow.pdf>. Napoleon also explains that many Indigenous groups record their laws in oral histories (*supra* note 3 at 15). According to Borrows, Indigenous peoples have recorded laws on paper in the past, but “many Indigenous societies prefer to express their legal principles through oral tradition to maintain flexibility and relevance amidst changing circumstances; he supports the co-existence of written and oral aspects of Indigenous law because oral aspects maintain that flexibility (Borrows, *supra* note 2 at 56).

⁵² *Orr v Fort McKay First Nation*, 2012 FCA 269 (CanLII), [2013] 1 CNLR 249 [*Orr*].

⁵³ *Ibid* at para 15–16.

governance. However, the problem in *Orr* was that a Canadian court made a ruling about an Indigenous issue and enforced a written legal document. Having Canadian courts making rulings about Indigenous legal documents appears to be another limit on self-governance. Thus, Indigenous constitutions need to include methods for enforcing their laws, and all three of the constitutions discussed in this paper have mechanisms for making laws and appealing those laws. However, the next step requires reviewing how Canadian courts have accepted the laws made under the auspices of these constitutions.

Drafting Indigenous constitutions is a difficult step and a test of an Indigenous group's capacity for self-governance. Well-drafted constitutions are essential for changing the relationship between these groups and the Crown. Their willingness to write down predominately oral traditions despite the difficulties in doing so illustrates that these First Nations are committed to replacing the *Indian Act* with an internally created constitution. The problem is that these new constitutions and the laws created under them are still coming before Canadian courts. Thus, appreciating the value of these constitutions requires an examination of how Canadian courts have treated these constitutions

IV THE LEGAL CONSEQUENCES: HOW HAVE CANADIAN COURTS RESPONDED TO INDIGENOUS CONSTITUTIONS?

Since the *Nisga'a Constitution* and the *Ta'an Kwäch'än Constitution* were ratified (in 1998 and 2012, respectively), both have received attention from the Canadian legal system. The results have been mixed. Overall, it appears that these Canadian courts are willing to defer to Indigenous constitutions and governance structures for issues that are local affairs and internal to those communities. However, the *Nipissing Gichi-Naaknigewin* appears to make claims for jurisdiction that go beyond the narrow scope Canadian courts have accepted; although it has not yet been the subject of a court case, a court likely will not endorse the growing jurisdiction demanded by the Nipissing. In short, it appears these constitutions can successfully receive judicial deference on issues that the *Indian Act* addresses. However, courts will likely reject any attempts by Indigenous peoples to use these constitutions to demand greater self-governance beyond the jurisdiction "given" to them through the *Indian Act* or other statutes.

A. Judicial Deference For Constitutional Provisions Regarding Local Affairs

Jurisdictional issues arise when members of the Indigenous communities that have drafted and ratified their own constitutions challenge the legitimacy of those constitutions in a Canadian court. The *Nisga'a Constitution* (and the final agreement that accompanied it) has come before Canadian courts on multiple occasions. So far, the courts have shown deference to the negotiated settlement between the Nisga'a and the Crown, since challenges by both non-Nisga'a politicians and members of the Nisga'a Nation have failed. A closer review of those cases reveals that the deference courts have shown may not be as supportive of Indigenous self-governance as it appears.

The seminal cases that address the Nisga'a Final Agreement and the self-governance apparatuses of the Nisga'a Nation (including its *Nisga'a Constitution*) are *Campbell*⁵⁴ and *Sga'nisim*.⁵⁵ In *Campbell*, the British Columbia Supreme Court upheld the Nisga'a Nation's constitutional right to self-govern.⁵⁶ That decision appears to show full support for Nisga'a self-governance from the Canadian legal system. However, higher courts have not endorsed Nisga'a self-governance with the same level of enthusiasm. In *Sga'nisim*, the British Columbia Court of Appeal rejected an attempt from within the Nisga'a Nation to have the Nisga'a Final Agreement declared invalid, but it made that decision for the wrong reasons. The court endorsed the Nisga'a Final Agreement because it was a well-structured treaty, but it refused to rule on whether the agreement was a manifestation of a constitutional right to self-govern.⁵⁷ The court clarified that the agreement does not give the Nisga'a government absolute or sovereign powers; both the treaty and section 35 of the *CA, 1982* limit Nisga'a powers.⁵⁸ This limit on the *Nisga'a Constitution* means that the Crown still has an ultimate say in the value of its content. If a constitution oversteps the power that the Crown wishes to grant, it can turn to the treaty or to its ability to justifiably infringe any right protected by section 35 of the *CA, 1982* (as discussed above). Therefore, the *Nisga'a Constitution* can be viewed as a positive step in moving away from relations between Nisga'a and the Crown centred on the *Indian Act*, but it does not push Indigenous self-governance beyond the limits of the Canadian constitution or treaty statutes.

Just as the *Nisga'a Constitution* appears to have its legal significance limited for the central rules of Indigenous governance and relations with the Crown, the *Ta'an Kwäch'än Constitution* has also received judicial deference, but only for its internal affairs. Yukon First Nations have received respect from the Canadian legal system on its constitutional and self-governance issues, but Yukon is enduring a slow transition away from the *Indian Act*. The Ta'an Kwäch'än Council and other Yukon First Nations groups, like the Kwanlin Dün, have seen the Yukon Supreme Court be as progressive as their colleagues at the British Columbia Court of Appeal in stating that Indigenous constitutions should receive constitutional treatment. In *Edzerza v Kwanlin Dün First Nation*, the court decided that it would avoid restricting the Indigenous community's ability to be self-governing.⁵⁹ In *Harpe*, the court explained that "the Constitution of the TKC is protected by ss. 25 and 35 of the Constitution Act, 1982 and should be interpreted as a constitutional document and not a statute."⁶⁰ Finally, in *Harpe v Massie*, the court elected not to get involved in a dispute because "it ultimately remains an internal dispute of a First Nation."⁶¹ These cases demonstrate that Yukon's legal system has committed itself to deferring to Indigenous constitutions.

This recognition is a step further from the rigid space in which the *Nisga'a Constitution* operates. However, Yukon's experience has not been entirely positive. Ken Coates explains that "each First Nation is moving at its own pace to assume responsibilities . . . In sum, the changes

⁵⁴ *Campbell*, *supra* note 16.

⁵⁵ *Sga'nisim*, *supra* note 17.

⁵⁶ *Campbell*, *supra* note 16.

⁵⁷ *Sga'nisim*, *supra* note 17 at para 53.

⁵⁸ *Ibid* at para 82.

⁵⁹ *Edzerza v Kwanlin Dün First Nation*, 2008 YKCA 8 (CanLII) at para 27, 256 BCAC 160.

⁶⁰ *Harpe*, *supra* note 45 at para 37.

⁶¹ *Harpe v Massie and the Ta'an Kwäch'än Council #2*, 2006 YKSC 39 at para 35, [2006] 4 CNLR 73.

in the Yukon were clearly transformative, albeit with lingering reminders of the long-term role of the Indian Act.”⁶² It appears that the *Ta’an Kwäch’än Constitution* and the constitutions of other First Nations in Yukon exemplify this slow progress toward the destruction of the *Indian Act*. With the help of the Yukon courts, these First Nations are evolving toward self-governance at a slow pace. That slow pace will ensure that these groups can effectively eliminate the *Indian Act* and replace it with better relations between the First Nations of the Yukon and the Crown. However, a slow pace of progress means a fuller realization of Indigenous self-governance remains a distant possibility.

B. The Likelihood of a Negative Reaction to “activist” Constitutions

While the *Nisga’a Constitution* does not do enough to advance the legal status of Indigenous self-governance and the *Ta’an Kwäch’än Constitution’s* improvements to Indigenous self-governance are slow, the *Nipissing Gichi-Naaknigewin* may have the opposite problem as it appears to be claiming more self-governance than Canadian courts are willing to accommodate. No Canadian court has yet considered the legality of the *Nipissing Gichi-Naaknigewin*, but this constitution may raise legal issues that the Crown will fight because the *Nipissing Gichi-Naaknigewin* extends its reach into issues on which the Crown does not want to negotiate with First Nations bands. John Borrows and Leonard Rotman explain how the *Report of the Royal Commission on Aboriginal Peoples* and subsequent government policies⁶³ have placed limits on Indigenous governments. Indigenous governments only have the inherent jurisdiction to regulate “core” areas of Indigenous jurisdiction, which includes all matters that “are of vital importance to the life and welfare of a particular Aboriginal people, its culture and identity; do not have a major impact on adjacent jurisdictions; and are not otherwise the object of transcendent federal or provincial concern.”⁶⁴ This perspective revisits a fundamental issue in Canadian–Indigenous relations as it shows that the Crown does not view this relationship as one in which two equal nations are bargaining. Instead, the First Nations governments are subordinate to the Crown.

The *Nipissing Gichi-Naaknigewin* pushes for expanded Indigenous self-governance that defies subordination, and some of its sections consequently could draw the ire of the Crown. For instance, Part 17.1 explains that the “Nipissing First Nation has exclusive jurisdiction to make laws with respect to environmental protection of natural resources. These laws shall be in accordance with Nipissing First Nation cultural practices designed to sustain and maintain our lands, fish, forest, wildlife, water and air and our heritage for future generations.”⁶⁵ This clause may be problematic, because although the Government of Canada’s policy states that it will negotiate First Nations control of natural resource management in treaties, the Crown retains the ultimate rights over “environmental protection.”⁶⁶ Thus, there appears to be an inconsistency between that policy and the *Nipissing Gichi-Naaknigewin’s* claim of “exclusive” authority. These issues are likely part of the treaty discussions between the Crown and the Nipissing, but this inconsistency will continue to exist until a treaty is in place.

⁶² Coates, *supra* note 13 at 19.

⁶³ See *supra* note 1.

⁶⁴ JJ Borrows and L I Rotman, *Aboriginal Legal Issues: Cases, Materials and Commentary*, 4th ed (Markham: LexisNexis, 2012) at 65.

⁶⁵ *Nipissing Gichi-Naaknigewin*, *supra* note 4 at Part 17.1.

⁶⁶ Indigenous and Northern Affairs Canada, *supra* note 1.

If that inconsistency continues to exist in the absence of a treaty or a treaty does not resolve the inconsistency, a Canadian court will likely have to resolve the issue of whether the *Nipissing Gichi-Naaknigewin* or Canadian environmental laws will govern environmental protection in lands claimed by the Nipissing. Gordon Christie is not optimistic about the result of such a decision:

In the context of Aboriginal law there is a strong tendency on the part of Canadian governments to ignore or downplay what courts have positively stated in respect to Aboriginal and treaty rights. Furthermore, courts have explicitly said very little about self-government rights. What they have said is both (a) fairly vague, and (b) seemingly inappropriate for true governance rights. In addition, this area is highly contentious, with powerful opposing interests at play, of the sort the governments of Canada are likely to want to protect. Finally, there must be concern about how victories and defeats in the law play out. All too often while successful actions are restricted to the “victorious” Aboriginal nation, all nations are exposed to the setbacks. Defeats become precedents, while victories are nearly always restricted to the particular situation.⁶⁷

Christie’s perspective suggests that there is little chance that a court would uphold the law in the *Nipissing Gichi-Naaknigewin* at the expense of Canadian government legislation. Thus, it appears that by asking for too much control, the Nipissing will need to take a more patient approach to Indigenous self-governance in the drafting of a constitution once treaty negotiations with the Crown come to fruition.

Christie’s pessimism stems from the fact that Indigenous rights have generally received unfavourable treatment by Canada’s courts and there has been a lack of judicial support for Indigenous self-governance in Canada. *Mitchell* is an example of a court rejecting claims for stronger self-governance because it would be difficult for courts to wrestle with competing sovereignties in Canada.⁶⁸ Thus it appears that Indigenous constitutions will need to continue to evolve slowly over time.

The evolution appears to be moving in a positive direction. The *Nisga’a Constitution* was mildly successful, but courts have given it less weight than proponents of self-governance may wish to see. the *Ta’an Kwäch’än Constitution*, a more recent incarnation, has received greater endorsement from courts in Yukon as those courts seem prepared to accept that these constitutions should be treated like constitutions. The *Nipissing Gichi-Naaknigewin* is the next attempt to move Indigenous self-governance forward. It appears inevitable that this constitution will find itself before the courts since it is inconsistent with official government policy. When it reaches the courts, judges will need to decide to either allow the evolution or push back against it. As Jennifer Dalton points out, this slow pace suits the Crown and the Canadian public generally, but it tests the patience of Indigenous peoples and their

⁶⁷ G Christie, “Aboriginal Nationhood and the Inherent Right to Self Government” (May 2007) at 3, online: National Centre for First Nations Governance <http://fngovernance.org/ncfng_research/gordon_christie.pdf>.

⁶⁸ *Mitchell*, *supra* note 31 at paras 112–115.

supporters.⁶⁹ Through their constitutions, First Nations can continue to push the pace of change and demand that Canada's courts catch up.

V CONCLUSION

Indigenous constitutions appear to stand at the crossroads between the old ways that the Crown and Indigenous peoples related to one another and the future of First Nations self-governance. That is why the drafters of these constitutions must be mindful of the dual role that these constitutions need to fulfil.⁷⁰ Their first role is they must facilitate the primary goals of modern treaties: dispensing with the *Indian Act* and providing members of First Nations bands with certainty during this period of transition.⁷¹ Accomplishing that task means these constitutions must be cognizable to Canadian courts and make space for shared jurisdiction with the Crown so the two sides can continue to build their relationship. However, their second role appears to be inconsistent with that first role because the second role requires Indigenous constitutions to be documents that advance the cause of Indigenous self-governance. Advancing self-governance requires these constitutions to facilitate Indigenous law-making and leave no space for the Crown to review the contents of these constitutions. This review of three Indigenous constitutions reveals that the first role is easier than the second.

The reasons why it is easier for these constitutions to replace the *Indian Act* but harder for them to assert self-governance without any control from the Crown are threefold. First, it appears that Canadian courts would be unwilling to accept that Indigenous constitutions derive their legitimacy from inherently Indigenous sources. Canada's courts and the Crown would prefer to treat these constitutions as a manifestation of an Aboriginal right to self-governance that the Crown can infringe upon. Second, the drafting of these constitutions appears to favour Crown concerns. While having citizenship codes and written constitutions will help First Nations bands replace the *Indian Act*, the citizenship rules appear to have Canadian, not Indigenous, sources, and codifications are unfamiliar ways of transmitting law for most First Nations. Third, Canadian courts have been lukewarm in their acceptance of Indigenous self-governance and Indigenous constitutions. The cases in British Columbia and Yukon suggest courts are open to endorsing these constitutions for the internal affairs of Indigenous peoples, so Indigenous groups will be able to manage their own affairs without having to contend with external sources of law like the *Indian Act*. However, those courts appear unprepared to accept Indigenous peoples' attempts to grasp greater self-governance than the Crown is willing to acknowledge. Overall, Indigenous constitutions are a positive step

⁶⁹ Dalton, *supra* note 36 at 77.

⁷⁰ Although this paper assumes that the creators and drafters of Indigenous constitutions are members of First Nations communities, there is little evidence to support that assumption since the names of drafters are not published with the constitutions. A future avenue of exploration could examine the identities of the drafters and the potential impacts of different drafter characteristics on the content of the constitutions. Are there differences between constitutions written by men or women, lawyers or non-lawyers, Indigenous or non-Indigenous?

⁷¹ Displacing the *Indian Act* is such an essential aspect of the conversation that it is easy to forget its importance. However, the negative implications of the *Indian Act* are severe and beyond the scope of this paper to discuss. In the context of legal traditions, the *Indian Act* has undermined the management of Indigenous legal orders and the application of Indigenous laws (Napoleon, *supra* note 3 at 16). It has also historically failed to incorporate human rights standards, which is why Borrows refers to it as a "racist and sexist document" with a "suffocating embrace" (Borrows, *supra* note 2 at 38, 43).

toward self-governance, but they do not reset the power imbalance between the Crown and Indigenous peoples in Canada.

There is room for hope. As many commentators acknowledge, the movement toward self-governance for Indigenous people is a slow process.⁷² Indigenous constitutions can contribute to that process by providing clarity about First Nations law-making for both Indigenous peoples who fear change and for Canadian courts who fear the outcome of greater Indigenous power. While they provide that clarity, Indigenous constitutions can also continue to stake claims for more self-governance through the sources of their legitimacy, the points of emphasis in their content, and the court cases that deal with them. Indigenous constitutions are a step in the right direction on the journey toward self-governance, despite their limitations.

⁷². See especially *supra* note 36.

DIMINISHING STRICTNESS: THE GROWING GAP IN ONTARIO'S PRIVATE LAW ENVIRONMENTAL LIABILITY REGIME

*Greg Bowley**

CONTENTS

Introduction	22
I Private Nuisance	24
II Ontario's 'Spills Bill'	27
III Rights and Wrongfulness	28
IV Assessing Ontario's Liability Regime	31
V A New Statutory Framework	33
VI Conclusion	35

The Ontario Court of Appeal's decision in *Smith v Inco Ltd* illustrates the degree to which private nuisance liability has evolved over the last hundred and fifty years from a tort of relatively strict liability into an increasingly fault-based source of liability. *Inco* also offers an opportunity to consider whether this evolution has left some wronged landowners behind.

This work considers the evolution of private nuisance into the tort it is today, and illustrates Ontario's previous statutory attempt to extend private liability to all instances of wrongful environmental contamination. The justifiability of Ontario's combined common law and statutory private law environmental liability regime is then evaluated against an understanding of private law liability as existing for the purpose of vindicating reciprocal equal freedom. Where Ontario's private law environmental liability regime is found to permit wrongful loss without opportunity for private redress, statutory changes are proposed to extend rights of compensation to all landowners suffering unjustifiable losses.

INTRODUCTION

There has, in recent decades, been a pronounced shift in the nature and extent of interference which a landowner must tolerate as a reasonable cost of life in society. The tort doctrine which has historically regulated such interferences, private nuisance, today offers

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far less protection from interference with land or the use and enjoyment thereof than it did a century ago. The shifting scope of private nuisance liability is particularly noteworthy in the context of Ontario's private law environmental liability regime, in which private nuisance plays a central role. As the scope of private nuisance liability has constricted over time, so too has the capacity of Ontario landowners to obtain private redress for contamination events causing harm to their land. This paper argues that the effect of narrowing private nuisance liability has been, in some circumstances, to leave Ontario landowners bearing the burden of unjustifiable losses. Structural and jurisprudential limitations pertaining to a supplemental statutory cause of action, which were intended to extend and clarify the scope of private liability available at common law, have prevented it from meeting the challenge posed by narrowing private nuisance liability.

Demonstrating the existence of the liability gap described above requires consideration of a specific factual context in which Ontario's private law environmental liability regime has determined that no liability arises. For several reasons, the factual context considered by the Ontario Court of Appeal in *Smith v Inco Ltd*² is attractive for this purpose. First, on the facts, it is a striking example of the kind of interference with land which would have been compensable in private nuisance a century ago, but for which no private redress is available today. Second, *Inco* remains one of the leading authorities in Canadian jurisprudence as to the scope and content of the doctrine of private nuisance, making it an important source of guidance as to the kinds of interference that will (and will not) be seen as compensable in future cases. Third, the Court of Appeal's reformulation of the "substantiality" test in *Inco* represents an important narrowing of private nuisance liability, making *Inco*, more than merely an authority on the narrowed scope of private nuisance liability in the twenty-first century, an active component of that jurisprudential evolution.

The argument presented in this paper proceeds as follows: first, the historical status of private nuisance as a tort of strict liability and the jurisprudential process that has constricted private nuisance liability over the past six decades, of which *Inco* is a component, are briefly summarized. Second, the paper considers the scope and limitations of the statutory cause of action set out in Ontario's *Environmental Protection Act*.³ Together, these first two sections provide a workable picture of Ontario's private law environmental liability regime,⁴ which, at bottom, determines what kind of contamination events will give rise to liability. Next, the paper offers an analysis of the degree to which Ontario's private law environmental liability regime permits the misidentification of wrongful loss as fortuitous (and therefore non-compensable) loss. The third section sketches out an equality-based view of private law to serve, for the purposes of this analysis, as an objective basis for distinguishing between wrongful and fortuitous loss. The fourth section of this paper, using this sketch of private law, analyzes the theoretical justifiability of the distinction between wrongful and fortuitous loss presently reflected in Ontario's private law environmental liability regime. In other words, using the facts in *Inco* as a case study, this section seeks to identify factual circumstances in which Ontario landowners must bear wrongful losses without avenues of private redress.

² *Smith v Inco Ltd*, 2011 ONCA 628, 107 OR (3d) 321 [*Inco*].

³ *Environmental Protection Act*, RSO 1990, c E19 [the *Act*].

⁴ It should be noted that this picture of Ontario's private law environmental liability regime does not consider the roles played by either the law of negligence or *Rylands* liability. For reasons that will, it is hoped, become clear, the omission of these bases of liability does not diminish the validity of the argument presented.

Fifth, to the extent that the potential for non-compensable wrongful loss is identified, statutory amendments are suggested to close any liability gaps.

I PRIVATE NUISANCE

Private nuisance has traditionally been categorized as a tort of “strict liability”, such that a successful claim could be established without demonstrating that the defendant had misconducted himself in causing loss. In a fault-based tort, such as negligence, the absence of markers of fault (i.e. recklessness or neglect as to the reasonably foreseeable impact of one’s conduct on others) is generally fatal to a claim for compensation. Absent fault, losses otherwise compensable in negligence (that is, losses not caused intentionally by the defendant) are merely fortuitous, and cannot, therefore, produce liability.

Strict liability torts, on the other hand, have historically operated differently. In the real property context, those who, through their conduct on their own land, interfered unreasonably with the use and enjoyment of their neighbour’s land were liable regardless of their ignorance, recklessness, or diligence in causing that interference. The nature of the defendant’s conduct had no bearing on whether private nuisance was established; what mattered to the assignment of liability was simply that the plaintiff’s use and enjoyment of land had been unreasonably interfered with as a result of the defendant’s conduct. Even the determination of whether an interference was or was not unreasonable was, historically, made without reference to the reasonableness of the defendant’s conduct, focussing instead on the nature of the interference suffered by the plaintiff and the factual context in which it took place.

In *St Helen’s Smelting Co Ltd v Tipping*,⁵ the House of Lords provided an excellent example of the strictness of Victorian private nuisance doctrine. In *St Helen’s Smelting*, Tipping had purchased land adjacent to the defendant’s copper smelter. Though he had previously been made aware of the smelter’s existence, Tipping did not know that it was active. Tipping subsequently discovered that the smelter, when operating, emitted “large quantities of noxious gases, vapours, and other noxious matter”⁶ causing injury to vegetation, livestock, and, exceptionally, people who were present on Tipping’s land.⁷ Tipping claimed that the smelter’s emissions both interfered with the use and enjoyment of the estate and diminished its value.⁸

Lord Westbury LC, finding in Tipping’s favour, distinguished between interference producing sensible⁹ personal discomfort and interference causing material injury to land,¹⁰ recognizing that personal discomfort and inconvenience must be tolerated to a reasonable extent as the cost of life in society.¹¹ However, a material injury to land would never be reasonably tolerable, such that liability in private nuisance would arise in relation to any

⁵ (1865), [1861-73] All ER Rep Ext 1389 (HL) [*St Helen’s Smelting*].

⁶ *Ibid* at 1390.

⁷ *Ibid*.

⁸ *Ibid*.

⁹ As opposed to “trifling” personal discomfort or inconvenience. See *ibid* at 1397 per Lord Wensleydale.

¹⁰ *St Helen’s Smelting*, *supra* note 5 at 1395 – 1396.

¹¹ *Ibid*.

“sensible injury to the value of the property”.¹² In determining the issue, Lord Westbury LC specifically rejected any contention that, because the locality in which the copper smelter was located was a reasonable one for its operation (and was, in fact, the location of many other similar industrial undertakings), it could be operated with impunity.¹³

The House of Lords painted a very different picture of the strictness of private nuisance over a century later in *Cambridge Water Co v Eastern Counties Leather plc*.¹⁴ In *Cambridge Water*, the plaintiff, a statutory supplier of municipal drinking water, had purchased land for the purpose of expanding its groundwater supply. The defendant’s tannery, operating above the aquifer accessed by Cambridge Water’s new groundwater supply, had for decades been using degreasing agents in its leather production activities.¹⁵ Spillage onto the floor of the defendant’s facility was commonplace, and a substantial amount of spilled degreasing agent seeped through the floor and into the aquifer below.¹⁶ Degreasing agent was subsequently detected at Cambridge Water’s new groundwater supply, which was removed from service in compliance with standards regulating drinking water quality.¹⁷ Cambridge Water, claiming in negligence, private nuisance, and *Rylands* liability, sought compensation for costs incurred in acquiring and developing a replacement groundwater supply.¹⁸

On the eventual appeal, the House of Lords concluded on the basis of *Overseas Tankship (UK) Ltd v The Miller Steamship Co (Wagon Mound (No 2))*¹⁹ that reasonable foreseeability of loss constituted an essential prerequisite for private nuisance liability.²⁰ In the course of finding that Eastern Counties Leather was not liable for what was identified as unforeseeable loss, *Cambridge Water* rendered private nuisance substantially more fault-oriented and, as such, a substantially less strict basis of liability.

The Court of Appeal for Ontario, in its decision in *Inco*, continued this narrowing of private nuisance liability. Over many years, Inco’s refinery had emitted substantial quantities of nickel particulate, which subsequently settled on nearby residential properties.²¹ The owners of land thus contaminated commenced a class proceeding seeking “stigma damages” for diminished land value caused by environmental contamination.²² The trial considered claims in private nuisance, public nuisance, *Rylands* liability, and trespass.²³

¹² *Ibid.*

¹³ *Ibid.*

¹⁴ [1994] 2 AC 264 [*Cambridge Water*].

¹⁵ *Ibid* at 291.

¹⁶ *Ibid* at 292.

¹⁷ *Ibid* at 294.

¹⁸ *Ibid.*

¹⁹ [1967] 1 AC 617 (PC).

²⁰ The prior decision in *Wagon Mound (No 2)* had identified reasonable foreseeability of loss as an essential component of private liability in public nuisance. *Cambridge Water*, *supra* note 13 at 301.

²¹ *Inco*, *supra* note 1 at paras 7 – 8.

²² *Ibid* at para 21.

²³ *Ibid* at para 22.

The trial judge accepted that nickel contamination constituted material injury of the sort referred to by Lord Westbury LC in *St Helen's Smelting*.²⁴ Had the trial judge been required to engage in the reasonableness analysis required for interferences with use and enjoyment of land, he indicated that the presence in the soil of nickel particulate at levels sufficient to diminish the land's value would have, in his judgment, constituted an unreasonable interference with use and enjoyment.²⁵ On either of the branches of private nuisance described in *St Helen's Smelting*, therefore, the trial judge would have found Inco liable.

The Court of Appeal for Ontario, however, disagreed with the conclusion that the mere presence of nickel contamination in the soil constituted material injury.²⁶ Rejecting the *St Helen's Smelting* formulation as "outdated and inappropriate," the Court of Appeal adopted a new standard, which required interferences to be "material, actual and readily ascertainable"²⁷ in order to benefit from the deemed unreasonableness described by Lord Westbury LC as attaching to material injuries to land. The reformulated standard required material injury nuisance claims to be more than trivial, crystallized, and not so "minimal or incremental as to be unnoticeable as it occurs" in order to give rise to liability absent an express finding of unreasonableness.²⁸

Applying this new standard, the Court of Appeal concluded that the nickel contamination in issue could not constitute material injury absent some consequent detrimental effect to the land or to a right associated with the land, indicating that a detrimental effect of this sort arises only where the interference complained of diminishes the suitability of the land for its intended use.²⁹ As the land in issue was used for residential dwellings, the Court of Appeal determined that no claim in private nuisance would arise in *Inco* absent contamination at levels posing a substantial threat to human health,³⁰ attaching no significance to the fact that some of the properties in issue had been contaminated to a level harmful to vegetation.³¹

The Court of Appeal's decision in *Inco*, considered against *St Helen's Smelting*, sets in stark relief the extent to which private nuisance has evolved over the past hundred and fifty years. There is little doubt that, had Lord Westbury LC considered the facts in *Inco*, a claim in private nuisance would have succeeded; indeed, it seems that the *St Helen's Smelting* material injury threshold was far lower than the *Inco* standard, as the former assigned liability on the basis of injury to vegetation, a loss which seems incapable of satisfying the *Inco* test in relation to residential land. *Inco*'s heightened standard for material injury is, therefore, a further example of the drift of private nuisance away from strict liability.

^{24.} *Ibid* at para 34.

^{25.} *Ibid* at para 35.

^{26.} *Ibid* at para 55.

^{27.} *Ibid* at para 49.

^{28.} *Ibid* at para 50.

^{29.} *Ibid* at para 57.

^{30.} *Ibid* at para 58.

^{31.} *Ibid* at para 58.

II ONTARIO'S 'SPILLS BILL'

On December 14, 1978, Harry Parrott, Ontario's Minister of the Environment, introduced amendments to the *Environmental Protection Act*³² which would, in time, become section 99.³³ Introducing the draft amendments, Dr Parrott noted that they were intended to "create liability [...] for damage resulting from a spill which clarifies and extends the right to compensation at common law."³⁴ In explaining the function of the statutory cause of action, Dr Parrott left no doubt as to the nature of the problem he confronted. Echoing Bramwell B's reasons in *Bamford v Turnley*,³⁵ Dr Parrott stated as follows:

I believe those who create the risk should pay for restoration as a reasonable condition of doing business; it is not up to an innocent party whose land or property has been damaged. At present, persons manufacturing and handling contaminants are not legally responsible in the absence of fault or other legal ground of liability. Common law and the existing provisions of the *Environmental Protection Act* are inadequate in spelling out the necessary procedures to control and clean up spills and restore the natural environment.³⁶ (Emphasis added)

After consultations, Dr Parrott introduced revised amendments on March 27, 1979, noting that they would still "impose clear responsibility for control, cleanup and restoration [of spilled pollutants]"³⁷ and establish contamination liability "which clarifies and extends the right to compensation at common law."³⁸ These amendments received royal assent on December 20, 1979,³⁹ but were not proclaimed into force until November 29, 1985.⁴⁰

The private law aspect of section 99 provides a right of action in relation to loss or damage incurred as a direct result of a spill.⁴¹ The *Act* defines a 'spill' as a discharge of a pollutant abnormal in quality or quantity into the natural environment.⁴² The descriptor "abnormal" has been the subject of some jurisprudential disagreement, particularly in relation to the emission of pollutants over a period of time in the ordinary course of business. In the context

^{32.} *Supra* note 2.

^{33.} Ontario, Legislative Assembly, *Official Report of Debates (Hansard)*, 31st Legis, 2nd Sess, No 151 (14 December 1978) at 6178 – 6179 (Hon Harry Parrott).

^{34.} *Ibid.*

^{35.} (1860), 3 B&S 62, 122 ER 25.

^{36.} Ontario, Legislative Assembly, *Official Report of Debates (Hansard)*, 31st Legis, 2nd Sess, No 151 (14 December 1978) at 6178 (Hon Harry Parrott).

^{37.} Ontario, Legislative Assembly, *Official Report of Debates (Hansard)*, 31st Legis, 3rd Sess, No 8 (27 March 1979) at 255 – 266 (Hon Harry Parrott).

^{38.} *Ibid.*

^{39.} Ontario, Legislative Assembly, *Official Report of Debates (Hansard)*, 31st Legis, 3rd Sess, No 145 (20 December 1979) at 5867.

^{40.} Ontario, Legislative Assembly, *Official Report of Debates (Hansard)*, 31st Parl, 3rd Sess, No 55 (29 November 1985) at 1946 – 1947 (Hon Jim Bradley).

^{41.} *Environmental Protection Act*, *supra* note 2 at s 99.

^{42.} *Ibid* at s 91(1).

of landfills, both ordinary (odour, debris and vibrations⁴³) and extraordinary (leachate⁴⁴) emissions have been found to be actionable pursuant to the *Act*; in the latter context, the emission of leachate was found to constitute, for the purposes of the *Act*, a ‘fresh’ spill on each day in which leachate emissions continued.⁴⁵ On the other hand, however, Nordheimer J’s subsequent decision in *Pearson v Inco Ltd*,⁴⁶ an early iteration of *Inco*, concluded that the plain meaning of the word ‘abnormal’ could not encompass the cumulative effects of long-term, ordinary operating emissions.⁴⁷ As a result, the plaintiffs’ statutory claim in *Pearson* (and, consequently, in *Inco*) was struck.

A second limitation on the *Act*’s capacity to assign liability arises from its adoption of two apparently contradictory statements on the role of fault, expressly stipulating that liability pursuant to section 99 is not dependent upon a finding of fault, while simultaneously providing the defendants with a complete due diligence defence.⁴⁸ As such, although fault plays no role in assigning liability pursuant to the *Act*, liability is nonetheless barred in circumstances in which faultlessness (in the form of due diligence) can be demonstrated. It is not clear how, if at all, the due diligence defence was intended to interact with the disclaimer of wrongfulness, in the form of fault, as a prerequisite of liability. While there has been no jurisprudential clarification of this relationship to date, it goes without saying that the due diligence defence and the judicial treatment of “abnormal” emissions each substantially restrict the usefulness of the statutory cause of action.

III RIGHTS AND WRONGFULNESS

Theoretical accounts of private law liability seek to provide a reasoned basis with which fortuitous loss may be distinguished from wrongful loss, the significance thereof being that the former produces no liability, while the latter, by virtue of its wrongful nature, does. Rather than merely accepting the existing statutory and common law regime as dictating, by its operation, whether any particular loss is or is not wrongful, it is important that those losses for which compensation is not available in Ontario are revealed/interrogated in the context of some external framework of justification.

For the purposes of this work, an equality-oriented rights-based approach is presented as a useful framework against which Ontario’s system of environmental liability may be measured. A rights-based approach conceives of the boundary between rightful and wrongful conduct as structured by the private rights of individual legal actors. This conception of wrongfulness and liability offers a foundation for two of the primary features of private liability; first, wrongfulness, on a private law basis, is entirely relational, such that there can be no conduct identifiable as “wrongful” absent an intersection with, and violation of, the rights of another. Second, and consequentially, a rights-based approach structures the essential relationship of

⁴³ *Hollick v Toronto (Metropolitan)*, (1998), 63 OTC 163, [1998] OJ No 1288 (Gen Div).

⁴⁴ *Mortgage Insurance Co of Canada v Innisfil Landfill Corp* (1996), 20 CELR (NS) 37, [1996] OJ No 1760 (Gen Div).

⁴⁵ *Ibid* at para 18.

⁴⁶ [2001] OTC 918, [2008] OJ No 4950 (Sup Ct Jus) [*Pearson*].

⁴⁷ *Ibid* at paras 22 – 23.

⁴⁸ *Environmental Protection Act*, *supra* note 2 at s 99(3).

liability between the wrongdoer and the injured party, offering an explanation for the fact that it is the former who is liable to make good the latter's losses, inasmuch as they are united as the wrongdoer and sufferer of the same act.⁴⁹

There is, by necessity, an element of prescription in the analysis offered here. In order to assess the degree by which Ontario's private law environmental liability regime justifiably distinguishes wrongful loss from fortuitous loss from a right-based perspective, some alternative description of the scope and content of individual rights must be used as the metric against which the rights presently provided by that regime may be evaluated. The rights presently provided for are, in essence, the rights currently protected by the common law of private nuisance, supplemented by the statutory cause of action described above; the present limits of private law liability, as such, exactly coincide with the limits of an Ontario landowner's enforceable rights to protect his land from interference by others. The question this work seeks to address is whether those limits are objectively justifiable as presently constituted.

To provide a standard against which the present delineation between wrongful and fortuitous loss (and, by extension, wrongful and rightful conduct) may be evaluated, this work takes as a starting point a conceptual entitlement of each member of society held to a standard of conduct shared in common equally with all other members. From this standpoint of juristic equality, a structure of reciprocal rights and obligations among individuals can be outlined, deviation from which triggers obligations of compensation, the satisfaction of which returns the parties to the *ex ante* state of juristic equality existing prior to the initial violation.⁵⁰ On this analysis of private law, it is the necessarily-reciprocal standard of conduct which provides the metric against which the nature of any particular loss may be assessed. Losses which arise from conduct which undermines the foundational normative equality of the parties to any particular transaction are readily identifiable as wrongful (and, therefore, justifiably compensable) by virtue of the fact that they arise from wrongful conduct. On this understanding, therefore, the extent of losses or their impact on the person suffering them is irrelevant in determining whether they should be compensable; the defining characteristic of compensable loss is that it arises from wrongful conduct.

In *Philosophy of Right*,⁵¹ GWF Hegel offered one view of a private law system predicated on the reciprocal rights and obligations of juristic equals in a pre-political (that is, non-legislative) state. The foundational normative equality that underpins Hegel's conception of private law arises from the common possession by all legal actors ("persons", in Hegelian terms) of the capacity for free will.⁵² The private law structure sketched below will be readily and correctly identifiable as drawing significantly on Hegel's theory of abstract right. It is intended to offer a simplified model of private law and private law rights shaped by a core theoretical commitment to the juristic equality of all legally-significant actors.

Given a fundamental and normatively-significant equality of status, it follows that all such persons must be equally free of limitations upon their conduct imposed by their peers. In this context, rights are understood as both the means by which one is, and remains, free

⁴⁹. See Ernest Weinrib, *Corrective Justice*, (Oxford: Oxford University Press, 2012) at 10.

⁵⁰. See generally Ernest Weinrib, "The Gains and Losses of Corrective Justice," (1994) 44 *Duke LJ* 277.

⁵¹. Translated by TM Knox (Oxford: Clarendon Press, 1952).

⁵². *Ibid* at para 29.

of external compulsion, as well as the substance and scope of freedom itself. A system of private law founded on reciprocal free equality has no regard for characteristics other than that free equality; as such, it expresses and vindicates the equal legal status of individuals notwithstanding any material or social distinction between them.⁵³ Under this framework, freedom, actualized through rights, and restriction, imposed by obligations, can only be distributed in a fashion justifiable in a society of free equals.

Rights and obligations are, therefore, related through reciprocity, and the only justifiable limitations on the rightful conduct of a free individual are those required to accommodate the rightful conduct of others. As such, in order to express one's own freedom through the exercise of rights, one must by necessity recognize both that all others share an equal right to express their own freedom in an identical fashion, and that one's own freedom (expressed through rightful conduct) is inherently and justifiably limited by the freedom (expressed through rightful conduct) of others. To be free from external compulsion in making one's own choices, therefore, is to accept that the scope of one's own freedom is legitimately limited by the free choices of others, though only to the extent to which one's own freedom simultaneously and legitimately limits that of others. In this way, individual freedom is limited only to the extent required to permit the broadest sphere of freedom amenable to co-existence with normative equals sharing identical entitlements to, and limitations upon, free conduct. In this conception, infringing the rightful conduct (that is, freedom) of another effectively undermines the capacity of all persons to conduct themselves in that way. Wrong, therefore, is not solely to do with the rights of the wronged party and the obligations of the wrongdoer; in addition, wrongs, by bringing the freedom-enabling capacity of rights into question, challenge the underlying system of right itself.

Conceptually, this structure of rights begins with the acquisition of material things not already the property of someone else, an act which need not involve any other person. When a person asserts control over an unowned thing, that thing is converted into personal property, and it remains in that relationship to its owner until it is wilfully destroyed, abandoned or alienated, and only then does it become available to become another's property. The property relationship between person and thing permits an owner to put property to any use desired (or to no use at all), and any such use, as an expression of the owner's freedom, is also a rightful act which must be respected by all other persons.

Once appropriated, the ownership of things can be abandoned or transferred to others. The mutually-willed transfer of property between persons simultaneously asserts the status of each party as free equals, each of whom is posited by the act of transfer as having equal legal capacity to both appropriate and alienate things, while also asserting the transferred thing's status as entirely and exclusively subject to its owner's will, whosoever that owner is from time to time. As such, by exchanging property, the parties to the transfer create a contractual relationship, wherein the parties submit themselves to each other as equals by accepting the terms of exchange as legitimate limitations upon their own freedom of action in relation to the contract's subject matter, thereby establishing their own law by which the rightness of their future conduct may be evaluated.

There must also, however, be a principle that governs relationships between free equals which are defined by property alone, where the parties have not by their mutual consent established a basis upon which the rightness of their conduct can be evaluated. In such

⁵³. *Ibid* at para 37.

circumstances, there can be no measure of rightness but for the fundamental requirements of equality itself; as a result, the only obligation of persons to each other in relationships defined by property is to respect each other's rights by refraining from impairing the expression of freedom embodied in the creation, use, and maintenance of a thing as property. The assertion of control or a right of control over the possessions of another is wrongful inasmuch as it undermines the basis of the property relationship itself, that is, the exercise of freedom which created the property relationship. As such, in order to vindicate the status of the wronged owner as the wrongful party's equal, there must be an entitlement to redress in favour of the wronged owner. This, I suggest, is the basis upon which private nuisance liability is justifiably assigned in a society committed to reciprocal free equality.

IV ASSESSING ONTARIO'S LIABILITY REGIME

Having outlined the scope of private liability provided by Ontario's environmental regime, it remains to determine the degree to which that regime ensures that liability attaches to environmental losses in all appropriate circumstances. The previous section, in reviewing one possible external basis for the objective identification of legal wrongs, provides a metric against which Ontario's regime for the private redress of environmental harm may be assessed.

The structure of private rights outlined above emphasizes that wrongful conduct is conduct which undermines the capacity of any legally-significant actor to exercise the fullest range of free self-determination compatible with the capacity of all others to do the same. In the context of the exercise of rights in relation to possessions, it is clear that any limitation thereby imposed on the ability of others to exercise their own rights in relation to their own possessions is recognizable as incompatible with a system of reciprocal rights. This conception of wrongfulness accords well with the historical strictness of private nuisance, which held landowners liable for interference despite the absence of ordinary indicia of fault, so long as the interfering action was itself an intentional act of the owner of the land from which the nuisance emanated,⁵⁴ or was continued or adopted by the owner as her own.⁵⁵

The balance struck by private nuisance at the intersection of two spheres of freedom focuses on the degree to which the limitations placed on the plaintiff are reasonable under circumstances in which neither plaintiff nor defendant have conducted themselves in a manner fundamentally incompatible with reciprocal free equality. Rather, in the context of conflicting land uses, the incompatibility with reciprocal free equality is merely contingent, crystallizing only where the burden imposed by the defendant's conduct transcends the boundary of reasonableness. Where the interference limits the plaintiff's freedom unreasonably, the law of private nuisance has recognized that interference as wrongful, assigning liability (and, possibly, enjoining future interferences of the same sort) in order to vindicate the position of the plaintiff as equal to the defendant.

An understanding of private nuisance as assigning liability in the context of unreasonable burdens imposed in circumstances of competing claims of right also offers an explanation for the fact that a landowner cannot be liable for emissions emanating from her land when they

^{54.} Consider, for instance, the "unknown third party or trespasser" defence to private nuisance: *Crown Diamond Paint Co v Acadia Holding Realty Ltd*, [1952] 2 SCR 161.

^{55.} *Sedleigh-Denfield v O'Callaghan*, [1940] AC 880 at 894.

are caused by the conduct of an unknown third party. Inasmuch as the defendant does not, in such circumstances, advance a claim that the activity in issue is rightful (to the contrary, she claims that it is the wrongful conduct of another), there are no competing claims of right. The plaintiff's action in private nuisance cannot succeed in such circumstances, but not because no burden has been imposed upon him; rather, the plaintiff cannot recover *from the defendant* because the defendant has not, through her conduct, imposed the burden of which the plaintiff complains. In keeping with this understanding, the plaintiff can succeed against the defendant in such circumstances only if the defendant has assumed the conduct of the unknown third party as her own, claiming it to have been rightful. This establishes a competing claim of right between the plaintiff and the defendant in relation to the assumed conduct, such that liability can be assigned if the burden was, in fact, unreasonable for the plaintiff to bear.

It is clear, on this understanding of private nuisance, that fault (meaning conduct which disregards the fundamental equality of the parties to any particular interaction) need not be present for private nuisance liability to arise. It should not, therefore, be surprising that the evolution of private nuisance liability into a more fault-oriented tort over the last five decades has diminished its capacity to vindicate a system of reciprocal freedom, particularly in circumstances in which no indicia of fault are present. If the function of fault-based indicia of wrongfulness in the context of negligence liability, for instance, is to indicate conduct which fails to demonstrate due regard for the physical integrity or possessions of one's free equals, those indicia should not be necessary in the context of competing claims of rightful conduct, which has been the traditional focus of private nuisance. As outlined above, inasmuch as there can be no right to unilaterally impose an unreasonable burden on one's equal, any conduct which would result in such an imposition can be recognized as wrongful (that is, inconsistent with a reciprocal free equality of legal persons), even absent further indicia of wrongfulness.

If indicia of fault actually function to delineate fortuitous loss from wrongful loss in circumstances where no tenable competing claims of right can be asserted (i.e. the defendant cannot purport to have had a right to cause the loss complained of by the plaintiff, as would be the case in the personal injury context), it would be predictable that grafting indicia of fault onto a strict liability tort would substantially narrow the circumstances in which that conduct would give rise to an obligation of compensation. As an example, the effect of *Cambridge Water* was to confirm a higher standard of liability, such that it was no longer sufficient (as it had been for centuries previous) for a defendant to merely cause loss to a neighbouring landowner in the course of exercising its rights in relation to property. As a result, losses have become compensable in private nuisance only when both reasonably foreseeable to the defendant and when unreasonably imposed in the context of competing claims of right.

This, then, brings the analysis back to *Inco*. The doctrine of private nuisance applied in *Inco* had been developed in *Cambridge Water*, and was further restricted by the Court of Appeal for Ontario to circumstances in which contamination does not rise to levels which actually interfere with the presently intended use of the contaminated property. In the case of residential property, therefore, Ontario's law of private nuisance after *Inco* imposes liability only for threats to human health reasonably foreseeable to the polluter at the time of the contamination event. In the case of long-term contamination events, such as that in issue in *Inco*, it would seem that this definition of private nuisance would likely render most contamination non-compensable, given the fact that most of the contaminant in question was likely emitted at a point in the past (i.e. prior to the installation of modern emission control measures) when the potential adverse effects of many contaminants would have been largely

unknown (as was the case, in most respects, in *Cambridge Water*). Even if potential adverse effects were reasonably foreseeable, no liability would arise in the absence of a finding of unreasonableness or a demonstrable hazard to human health.

The Court of Appeal for Ontario concluded that the losses suffered by the homeowners of Port Colborne were not wrongful, and therefore were not compensable. It does not appear, however, that this conclusion is justifiable in the context of the structure of private rights outlined above. The Court of Appeal's decision was framed very much on the basis of the existing uses to which the residential properties in issue were put at the time the nickel particulate accrued thereon, and was narrowly drawn even in that context. It may surprise Ontario landowners to discover that private nuisance law relating to material injuries to land will not, in light of *Inco*, impose liability for the long-term cumulative effect of emissions which, for example, render their land incompatible with the cultivation of a vegetable garden. Limited thusly, the conclusion that no actionable interference took place in *Inco* was a cogent one. However, the unavoidable effect of this conclusion is that the owners of those properties are, in essence, frozen in their existing uses, and, perhaps, are limited even within the present scope of those uses. More precisely, by limiting the inquiry to existing uses, the Court of Appeal permitted all possible future uses of the residential properties in issue to be limited by Inco's unilateral conduct to those compatible with the contamination Inco placed upon them.

This confiscation of future incompatible uses clearly imposes an external limitation on the freedom of landowners to choose, in the future, the uses to which their land is put.⁵⁶ The individual spheres of freedom of each plaintiff landowner in relation to their own property was diminished by Inco's conduct to the extent that their future capacity to freely exercise their rights of property in ways different from the current uses at the time of contamination was limited by Inco's unilateral acts. In a system characterized by free equality, only voluntary self-determination is permissible, such that legally-significant limitations on the future acts of persons can only be secured by mutual assent. As such, while Inco could have purchased the plaintiffs' rights to undertake future uses incompatible with the presence of nickel contamination, it was not within the scope of Inco's freedom to unilaterally impose such a limitation. In so doing, Inco undermined the system guaranteeing its own freedom in relation to its land. To the extent that it operated to permit Inco to engage in this (wrongful) conduct without incurring liability, the private nuisance doctrine applied in *Inco* cannot be reconciled with an understanding of private law founded on free equality. If free equality is accepted as a reasonable metric for the justifiable assignment of liability, this situation cannot be permitted to persist.

V A NEW STATUTORY FRAMEWORK

As the analysis above suggests, Ontario's existing environmental liability framework fails to ensure recovery for some landowners, specifically those who find themselves in circumstances analogous to the facts in *Inco*, suffering wrongful loss at the hands of their neighbours. The most practical way to ensure that such injustice is prevented is through statutory change, specifically in the form of amendments to the *Act's* statutory cause of action.

⁵⁶ Ignoring, for the purposes of this analysis, any public law limitations as to the future uses of the land, which are not germane to the private law analysis undertaken here.

The standard of liability set out in the *Act* is, as it stands, well-suited for adaptation to this role. But for the statutory defence of due diligence, the *Act*'s rejection of indicia of fault as prerequisites for recovery shares much with earlier, stricter versions of private nuisance liability. As such, it would not be difficult to codify a strict liability version of private nuisance liability for the purposes of extending liability to all wrongful instances of environmental contamination. However, as discussed above, the statutory cause of action has its own limitation which must be addressed, specifically the "abnormality" threshold, which operates to obstruct recovery in unjustifiable circumstances.

As such, the following two minor amendments, indicated with underlining, are suggested as one way in which the *Act*'s statutory cause of action could extend to capture, on a strict liability basis, all damage to land resulting from contamination events which is unjustifiable on a standard of equality such as that set out above:

91. (1) In this Part,

[...]

"spill", when used with reference to a pollutant, means a discharge,

- (a) into the natural environment,
- (b) from or out of a structure, vehicle or other container, and
- (c) except in relation to damage to land or interests in land, that is abnormal in quality or quantity in light of all the circumstances of the discharge,

and when used as a verb has a corresponding meaning;⁵⁷

[...]

99. (3) An owner of a pollutant or a person having control of a pollutant is not liable under subsection (2) if they establish that they took all reasonable steps to prevent the spill of the pollutant except in relation to damage to land or interests in land or if they establish that the spill of the pollutant was wholly caused by,

- (a) an act of war, civil war, insurrection, an act of terrorism or an act of hostility by the government of a foreign country;
- (b) a natural phenomenon of an exceptional, inevitable and irresistible character; or
- (c) an act or omission with intent to cause harm by a person other than a person for whose wrongful act or omission the owner of the pollutant or the person having control of the pollutant is by law responsible,

or any combination thereof.⁵⁸

These amendments would, in the limited context of discharges of pollutants causing damage to land or to an interest in land, overcome the limitations arising from both the "abnormality" threshold and the due diligence defence. The cause of action thus amended would impose a standard of liability very much like that which animated the doctrine of private nuisance until recent decades, to the effect that damage to land arising from pollutant

^{57.} *Environmental Protection Act*, *supra* note 3 at s 91(1).

^{58.} *Ibid* at s 99(3).

spills would always give rise to liability in the environmental loss context. Combined with a damages-only remedy such as that provided for in the *Act*, an amended statutory cause of action would offer an attractive balancing of the competing legal and economic interests of polluters and their neighbours, inasmuch as it would compel polluters to internalize the full environmental costs associated with both incidental and unavoidable emissions, while simultaneously protecting them from the disruption of injunctive relief.

VI CONCLUSION

Owning land is a riskier proposition in the 21st century than it was in the 19th century. Contemporary landowners are clearly required to endure far more interference with both the use and enjoyment and the physical integrity of their land than at any previous time in common law history. Indeed, the Supreme Court of Canada's recent decision in *Antrim Truck Centre Ltd v Ontario*⁵⁹ has, since the decision in *Inco*, expressly abolished the privileged position previously occupied by material injuries, which has shaped Anglo-Canadian private nuisance jurisprudence since *St Helen's Smelting*;⁶⁰ further narrowing the scope of private nuisance liability by requiring even material injury to land to be assessed on the basis of unreasonableness before liability will arise. Accommodation and forbearance seems to be the new normal in the paradigm of conflicting property rights.

If private law is to be more than an arbitrary patchwork, circumstances of objective injustice which leaves wrongful loss to lie where it falls must not be ignored. Statutory change of the sort suggested above offers an opportunity for targeted reform without exposing the environmental liability regime itself to unpredictable further jurisprudential modification in the future. Although returning the common law doctrine of private nuisance to its historical degree of strictness may arguably be neither practicable nor desirable in contemporary society, there is ample justification for doing so in the specific context of environmental contamination arising from the industrial production, transportation and storage of pollutants. A regime which ensures that industrial undertakings internalize the entire tangible cost of their emissions would protect the interests of neighbouring landowners while simultaneously aligning the interests of emitters with the contamination-reduction interests of society as a whole.

^{59.} 2013 SCC 13, [2013] 1 SCR 594.

^{60.} *Ibid* at paras 46 – 48.

RETURNING THE RICE TO THE WILD: REVITALIZING WILD RICE IN THE GREAT LAKES REGION THROUGH INDIGENOUS KNOWLEDGE GOVERNANCE AND ESTABLISHING A GEOGRAPHICAL INDICATION

Sara Desmarais

CONTENTS

I	Introduction	36
II	Wild Rice	39
III	Geographical Indications	44
IV	Applying Geographical Indicators To Wild Rice	47
V	Conclusion	51

This season—the Anishinaabeg wild rice moon Manoominike Giizis—is the season of a harvest, a ceremony, and a way of life ... Far away, a combine is harvesting paddy-grown wild rice somewhere in California, some biopirates are hunting for genes, and consumers are eating a very different food. The Anishinaabeg would not trade. In the end, this rice tastes like a lake, and that taste cannot be replicated.¹

—Winona LaDuke

I INTRODUCTION

Known as the State Grain of Minnesota,² it is worth noting that wild rice (*Zizania palustris*) is not technically a variety of rice; rather, it is an aquatic grass seed native to North America's Great Lakes region (GLR), naturally thriving in shallow water and small lake

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¹ W LaDuke, *Recovering the Sacred: The Power of Naming and Claiming* (Cambridge, MA: South End Press, 2005) at 190.

² "State Grain, Wild Rice," (2018), online: Office of the Minnesota Secretary of State Steve Simon <<https://www.sos.state.mn.us/about-minnesota/state-symbols/state-grain-wild-rice/>>

systems. Also known as manoomin (the “good berry”) in Ojibwe,³ wild rice has served as a traditional staple food for the Anishinaabeg people residing in the region for centuries.⁴ Wild rice also serves as an indicator of a healthy aquatic ecosystem and source of food for a variety of wildlife, revealing the significance of this aquatic grain to the GLR.

Traditionally thriving in what is now Ontario, Manitoba, Minnesota, and Wisconsin, the only indigenous grain in North America has since been conquered and domesticated. Today, most wild rice is cultivated not in natural watersheds of the Great Lakes basin but in flooded farm fields on the west coast in California. Interestingly, the California Wild Rice Advisory Board even acknowledges that this sacred grain has been “domesticated”, noting that “although California has taken some of the ‘wild’ out of wild rice, California farmers have made it possible for millions of people to enjoy this once rare product.”⁵ Industrial pollution and urbanization have severely impacted this sacred seed’s traditional habitat, and the seed itself has become a profitable crop in a region of the continent where it does not appear in the wild.

Despite wild rice’s exploitation, many Anishinaabeg communities both within Canada and the United States are fighting to maintain the traditional habitat of wild rice and continue to harvest it traditionally, thus ensuring that manoomin remains wild. When comparing the “wild” rice from California to the grains grown naturally in the GLR, the quality and flavour of the cultivated crop pale in comparison to a wild crop.⁶ Despite the difference in quality, as well as the impact on the environment through the cultivation process, the crops grown in California that have been hybridized and mechanically harvested continue to be presented to consumers as “wild” rice, when there is nothing wild about it.

Given the cultural and ecological significance of wild rice in the GLR, the protection of the roots of this sacred grain is essential, and this paper explores how Western intellectual property law can provide a solution to protect the legacy of wild rice. This paper argues that through the adoption of a geographical indication (GI) for wild rice in the GLR, combined with Indigenous Knowledge Governance of this grain, the legacy as well as the natural habitat of wild rice can be revitalized by recognizing the value of the grain’s cultural and ecological origin.

To understand how wild rice would benefit from a GI, section II provides an overview of what makes this grain so unique by exploring the traditional practices surrounding wild rice and examining the process of domesticating the grain and how it became a crop in California. Section III discusses the concept of GIs and what the implementation of this intellectual property right would entail. With this background information provided, the paper will then, in section IV, apply the notion of GIs to wild rice, assessing the strengths and weaknesses of

³ Great Lakes Indian Fish and Wildlife Commission, “Manoomin ~ Wild Rice: The Good Berry,” online: <http://www.glifwc.org/publications/pdf/Goodberry_Brochure.pdf>. Note: This paper focuses on the relationship between wild rice and Anishinaabeg peoples generally. I make reference to the Ojibwe within this paper, who are one of the distinct groups of people who make up the Anishinaabeg. It is important to note that not all Anishinaabeg groups who harvest wild rice identify as Ojibwe peoples—it is simply the case that many sources and discussions surrounding wild rice come from an Ojibwe perspective.

⁴ TA Steeves, “Wild Rice: Indian Food and a Modern Delicacy” (1952) 6:2 *Economic Botany* 107 at 117-118.

⁵ California Wild Rice Advisory Board, “The California Wild Rice Story” (2015), online: <<http://cawildrice.com>>

⁶ *Supra* note 1.

this approach, while also envisioning what this GI would look like when taking Traditional Knowledge surrounding wild rice into consideration.

Before delving into the discussion of wild rice and the potential of establishing a GI to protect its ecological and cultural integrity, it is essential to explain the concept of Traditional Knowledge.⁷ Traditional Knowledge is a collectively held knowledge that “is embedded in the local culture of an indigenous community. This knowledge constitutes crucial elements of the holistic approach towards both the natural and man-made livelihood of these principles.”⁸ Unlike Western knowledge, this knowledge is not written down; it is shared and learned orally and through practice.⁹ Being spiritual in origin, “this knowledge might come to us from relationships, experiences, story-telling, dreaming, participating in ceremonies, from the Elders, the oral tradition, experimentation, observation, from our children, or from teachers in the plant and animal world.”¹⁰

Although this knowledge is grounded in “tradition” and is passed from one generation to another, Traditional Knowledge is not stagnant: “Traditional Knowledge systems extend into the present, and are alive and constantly adapted in order to remain relevant to contemporary indigenous life.”¹¹ Simpson emphasizes that Traditional Knowledge becomes a valuable tool for Indigenous communities when dealing with contemporary issues:

As more and more Aboriginal Peoples look to their traditions and to their knowledge for the strength and courage to meet the demands of contemporary society, the process of cultural revitalization will be recorded in our oral traditions and will become part of our Indigenous knowledge, just as our experiences with the process of colonization, assimilation, and colonialism is part of our body of knowledge.¹²

With Traditional Knowledge being community based, it is a distinct, evolving knowledge that is unique to every community—there is no one-size-fits-all Traditional Knowledge

⁷ Note: Throughout this paper, I use the term “Traditional Knowledge”; however, there are other commonly used terms/forms of knowledge, such as “Indigenous Knowledge.” Conversely, when I use the term “Indigenous Knowledge Governance” it is referring to a discussion of how Indigenous communities have the right to determine and govern how their Traditional Knowledge is shared and used.

⁸ HM Haugen, “Traditional Knowledge and Human Rights” (2005) 8:5 *Journal of World Intellectual Property* 663 at 665.

⁹ *Ibid.*

¹⁰ L Simpson, “Aboriginal Peoples and Knowledge: Decolonizing Our Processes” (2001) 21:1 *Canadian Journal of Native Studies* 137 at 142.

¹¹ E Simon et al., “Traditional Knowledge” (2016) at 1, online: Simon Fraser University <https://www.sfu.ca/ipinch/sites/default/files/resources/fact_sheets/ipinch_tk_factsheet_march2016_final_revised.pdf>. See this source generally for a further explanation of Traditional Knowledge and some of the challenges with using and protecting Traditional Knowledge.

¹² Simpson, *supra* note 10 at 143–144.

blanketing over all Indigenous communities. Therefore, the utilization and governance of this Traditional Knowledge is community specific.¹³

By exploring the potential of GIs and their utility in protecting agricultural products, this paper will explore how intellectual property regimes and Traditional Knowledge can co-exist in the protection and recognition of one of North America's most significant plant species.

II WILD RICE

As mentioned previously, wild rice is an aquatic grass native to North America. Specifically, there are three North American species of wild rice: *Z. palustris* (which is found in the GLR in Canada and the United States and is harvested for food), *Z. aquatica* (which grows in the St. Lawrence River and the eastern and southeastern regions of the United States in coastal areas and is not harvested for food), and *Z. texana* (which grows in a small region of Texas and is not harvested for food).¹⁴ For the purposes of this paper, "wild rice" refers to *Z. palustris* since this is the variety of wild rice that is actually harvested as food for people and is native to the GLR.

This annual plant thrives in rivers and lakes with soft organic bottoms and an optimum depth ranging from 0.3 to 0.6 metres deep.¹⁵ Wild rice has a key role within its ecosystem: "wild rice provides important feeding and resting areas for waterfowl on their seasonal migration and is utilized by a variety of mammals, fish and invertebrates."¹⁶ Furthermore, wild rice helps stabilize loose soils, serves as a natural windbreak, and improves water quality by countering "the effects of nutrient loading and the potential increases in algal growth and lake turbidity."¹⁷ As a keystone species, the presence of wild rice plants in a lake or shallow water system speaks volumes of that water system's health.¹⁸

However, the benefits of wild rice are not limited to its ecological significance; wild rice has a long history of benefiting human beings as well. Wild rice has served as a staple food for the

¹³ J de Beer & D Dylan, "Traditional Knowledge Governance Challenges in Canada" in M. Rimmer, ed, *Research Handbook on Indigenous Intellectual Property* (Edward Elgar, 2015) 1 at 18: ("traditional knowledge governance is an inherently local and culturally specific matter. The locality and specificity, however, is to the Aboriginal community concerned and *not* to the province or territory in which the People happen to reside").

¹⁴ EA Oelke, "Wild Rice: Domestication of a Native North American Genus," in J Janick and JE Simon eds, *New crops* (Wiley, New York: Purdue University, 1993) <<https://hort.purdue.edu/newcrop/proceedings1993/V2-235.html>>

¹⁵ AD Drewes & J Silbernagel, "Uncovering the Spatial Dynamics of Wild Rice Lakes, Harvesters and Management across Great Lakes Landscapes for Shared Regional Conservation," (2012) 229 *Ecological Modelling* 97 at 98.

¹⁶ *Ibid.*

¹⁷ Minnesota Department of Natural Resources, "Natural Wild Rice in Minnesota: A Wild Rice Study Document Submitted to the Minnesota Legislature by the Minnesota Department of Natural Resources February 15, 2008" (2008) at 9–10, online: Minnesota Department of Natural Resources <http://files.dnr.state.mn.us/fish_wildlife/wildlife/shallowlakes/natural-wild-rice-in-minnesota.pdf> [MDNR].

¹⁸ See J Kimball, "Ecological Importance of Wild Rice" (2018), online: University of Minnesota <<http://wildricebreedingandgenetics.umn.edu/education-outreach/ecological-importance-wild-rice/>>: "[T]he overall health of many Great Lakes ecosystems can be gauged by the health of the northern wild rice populations in them."

Anishinaabeg in the GLR (both in the United States and Canada) for centuries, providing an abundance of nutrients: “wild rice is a centerpiece of our community’s sustenance ... [it] offers amino acids, vitamins, fiber, and other essential elements, making it one of the most nutritious grains known to exist.”¹⁹ In addition to its nutritional value, wild rice has a long history of cultural, spiritual, and even economic significance for Anishinaabeg people, being hand harvested in the GLR for over 2,000 years.²⁰

According to the oral histories of the Anishinaabeg, wild rice, or the “good berry,” is what led them to settle in the region surrounding the Great Lakes:

Their Migration Story describes how they undertook a westward migration from the eastern coast of North America. Tribal prophets had foretold that this migration would continue until the Ojibwe people found “the food that grows on water.” That food was wild rice, known as manoomin, and is revered to this day by the Ojibwe as a special gift from the Creator.²¹

Winona LaDuke notes the legacy of her ancestors seeking the food that grows on water: “The Anishinaabeg moved over rivers, streams, and lakes to the GLR, where today a hundred or more reservations and reserves on both sides of the US–Canada border mark *Anishinaabe Akiing*, the land of the people.”²²

The traditional harvesting of wild rice in the fall is a sacred practice for the Anishinaabeg and is still practised by many Anishinaabeg communities.²³ Kyle Whyte, who identifies as Potawatomi (another group of Anishinaabeg peoples), notes that the harvesting of wild rice is an important responsibility for the Anishinaabeg to uphold:

Today, stewarding and guarding manoomin involves many responsibilities. There are responsibilities for teaching younger people capacities to respect, care for, harvest, understand, and prepare manoomin; responsibilities on the part of younger people to learn the skills and teachings regarding the plant and to participate actively in family life; responsibilities associated with conducting and participating (appropriately) in ceremonies that honor the close connections between manoomin and Anishinaabe society; responsibilities of committees, such as “ricing committees,” that are accountable to the community for maintaining flourishing subsistence economies.²⁴

The responsibility that Whyte speaks of is reciprocal—the wild rice has a responsibility to care for the Anishinaabeg as well: “Manoomin is responsible for nourishing humans. Manoomin is ... one of the sources that bring people together into the relationships of family, friendships, trust and so on. Manoomin motivates these things, which is why Anishinaabe

¹⁹ LaDuke, *supra* note 1 at 168.

²⁰ MDNR, *supra* note 17 at 7.

²¹ *Ibid.*

²² LaDuke, *supra* note 1 at 168.

²³ KP Whyte, “Conveners of Responsibilities,” online: Center for Humans and Nature <<https://www.humansandnature.org/earth-ethic-kyle-powys-whyte>>

²⁴ *Ibid.*

people respect it as a living being with a spiritual character.”²⁵ This relationship of co-stewardship makes the harvesting of wild rice crucial to ensure that wild rice is able to renew itself every year in the GLR.

James Whetung of Curve Lake First Nation has spent a considerable amount of time revitalizing wild rice in Pigeon Lake, near Peterborough, Ontario. He re-seeds and harvests the lake, and through his company, Black Duck Wild Rice, he educates people—members of the Indigenous community, schools, and other community organizations—on the traditional method of harvesting wild rice, sharing teachings and Traditional Knowledge of the land and the water.²⁶ The traditional method of collecting wild rice involves using canoes (although today a variety of boats are used) being navigated through the wild rice stands so that the ripe rice seeds could be knocked off their stalks into the boat with a stick. Of course, this results in some rice falling into the water. Not collecting every seed is significant, as this ensures that the stock of wild rice will replenish itself with the seeds that germinate on the lake bottom for the next harvesting season.²⁷ Failure to follow this practice of sustainable harvesting and taking the entire seed supply would result in disciplinary action: “Individuals who did not follow the guidance of the elders in regards to where and when to harvest were likely to have their canoes taken from them and any rice they had gathered, dumped on the lake bottom.”²⁸

The process of harvesting the wild rice does not end with the canoes gliding through the shallow waters. Once the gathered rice is brought to shore, the rice then needs to dry in the sun and further dry over a slow fire in a kettle before being winnowed to separate the rice seeds from their hulls.²⁹ While at this point the rice is ready to be cooked and consumed, acknowledging its sacredness through ceremony and a feast in thanksgiving concludes the traditional harvesting of wild rice.³⁰

Despite the tedious process to gather wild rice, the harvesting season is a special time for the community to come together, even though the number of ricers in Anishinaabeg communities has diminished over time due to a plethora of reasons (i.e., job obligations in today’s society or economic pressures).³¹ Today, the harvesting of wild rice can help provide a profit for Anishinaabeg ricers, however, this profit is not what drives community members to continue ricing: “Whether they’re processing for sale, for tribal members in schools and other community programs, or for their own consumption, for these men and many others in the community, locally processed, lake-harvested, Native rice is about doing it right, about community pride and the essence of being Anishinaabeg.”³²

25. *Ibid.*

26. “Indian & Cowboy,” online podcast, *Stories from the Land: James Whetung* (May 8, 2017), online: <<http://indianandcowboy.ca/podcasts/stories-from-the-land-james-whetung/>> at 00:20:25: “[W]e all own [wild rice], and we are all responsible for it.” See generally N Matsumoto, “Food Politics: How Wild Rice Is helping This Native American Tribe Restore its Health—and Heritage” (October 7, 2017), online: Nancy Matsumoto, Writer and Editor (blog) <<https://nancymatsumoto.com/articles/2017/10/23/food-politics-how-wild-rice-is-helping-this-native-american-tribe-restore-its-healthand-its-heritage>>

27. Oelke, *supra* note 14 at 100.

28. *Ibid.*

29. B Coleman, “The Ojibwa and the Wild Rice Problem” (1953) 26:3 *Anthropological Quarterly* 79 at 80–81.

30. *Ibid* at 81.

31. LaDuke, *supra* note 1 at 168.

32. LaDuke, *supra* note 1 at 170.

Although the number of traditional ricers has declined, the consumption of wild rice is more popular than ever in North America. Wild rice is no longer wild, nor is it mainly found in natural waterways surrounding the Great Lakes; it has been commodified and exploited over the last 60 years: “Since about 1950, wild rice has been in the process of becoming a domesticated crop in the United States and is now being grown commercially in both the United States and Canada ... In the United States, wild rice is being produced commercially as a ‘domesticated’ field crop in diked, flooded fields. Minnesota and California account for most of the hectareage ...”³³

These flooded fields, or “wild” rice paddies, drastically increased the amount of rice being produced and have permanently altered the market for traditional wild rice: “Like other small farmers faced with competition from agribusiness, lake-harvested rice could no longer effectively compete in price with the corporations’ mass-manufactured paddy crop.”³⁴ The state of California in particular has homed in on the exploitation and mass production of wild rice, out-producing Minnesota: “Starting from zero pounds in 1976, just 30 years later California harvested an estimated 11 million finished pounds with acreage expanding to over 16,000 acres—making California the largest producer of Wild Rice in the world.”³⁵

Wild rice has gone from naturally thriving in the plentiful lakes and rivers surrounding the Great Lakes to being mass produced in flooded fields within a state that frequently has water shortages and droughts.³⁶ Agribusinesses in California have taken manoomin out of the wild and have gone as far as to alter wild rice and patent it.³⁷ NorCal Wild Rice’s patent number 5955648A essentially hybridizes wild rice seed so that the male rice seeds are sterile, which increases the yield of wild rice production, thus maximizing profits.³⁸

The approach to cultivating and controlling wild rice is completely contrary to the Traditional Knowledge and practices of the Anishinaabeg surrounding wild rice: “While our communities for thousands of years have prayed each year for fruitfulness and given thanks for the bountiful harvests, genetic manipulations and the introduction of sterile seeds is the spiritual opposite.”³⁹

While traditional wild rice stands in the GLR are ecologically significant and provide not only human sustenance but sustenance for a variety of mammals, birds, and insects, the domesticated wild rice in California is a commodity and therefore too valuable to share with

³³. Oelke, *supra* note 14. Oelke notes that the Canadian approach to commercialized wild rice production typically occurs on lakes leased from provincial governments.

³⁴. LaDuke, *supra* note 1 at 172.

³⁵. “The California Wild Rice Story,” *supra* note 5 at para 5.

³⁶. LaDuke, *supra* note 1 at 172.

³⁷. “Hybrid Wild Rice Production Utilizing Cytoplasmic-Genetic Male Sterility System,” US Patent No 5955648, September 21, 1999.

³⁸. *Ibid.*

³⁹. LaDuke, *supra* note 1 at 178.

non-humans.⁴⁰ An article from 1994 explored how farmers in California can “protect” their wild rice crop from hungry blackbirds.⁴¹ Most of the farmers surveyed for the article reported a 1–10 per cent yield loss due to blackbird problems, and when asked what they would like to see researched in terms of blackbird problems, 86 per cent of the farmers “wanted research in the area of population control, including electrocution, biological pathogens, trapping, birth control, nest destruction, improved shot loads, and toxicants.”⁴² Desiring control methods that result in the deaths of hungry birds goes against the Anishinaabeg view of the good berry that is wild rice, and is, in fact, antithetical to the very notion of something with the word “wild” in its name.

The commodification and domestication of wild rice are not the only human-based factors that are compromising the well-being and good nature of wild rice. There are a number of human-influenced factors that are threatening the ecosystems where wild rice grows (whether it is actively being harvested or not), such as hydrology and water levels altered by human activities, introduction of invasive species, and climate change.⁴³ The draining of wetlands to make room for farmland and development, as well as the construction of hydroelectric dams, are contributing to the loss of Canadian and American wild rice stands: “In Canada, the Fort Alexander Indians at Lac DuBois near the mouth of the Winnipeg River must now paddle 50 miles upstream, portaging around hydroelectric dams, to get to rice beds. Stanjigoming Bay on Rainy Lake in Ontario was also a prime ricing location until the Fort Frances Dam was installed for the benefit of the lumber companies.”⁴⁴

Cottagers and settlers with waterfront properties on both sides of the border are also contributing to the loss of naturally occurring wild rice. For instance, the Department of Natural Resources in Minnesota “has seen a doubling of requests by shoreland owners for permits to remove wild rice. Increased development along shallow lakes, and increased motorized recreational use on lakes that harbour shallow bays of wild rice will continue to reduce wild rice habitat.”⁴⁵ Ontario’s Pigeon Lake, which is located near Curve Lake First Nation, has been the subject of controversy for several years. In 2014, a website call “Save Pigeon Lake” emerged—but just what did Pigeon Lake need saving from? The answer is the traditional harvesting of wild rice.⁴⁶ A number of cottagers have taken issue with the wild rice

40. Matsumoto, *supra* note 26. James Whetung discusses the importance of sharing the bounty of wild rice with the other species residing on the lake: “This is a garden and we’re all part of it,” he adds. “If we don’t pick the rice that family of muskrats will.” Coexisting with other wild rice eaters is to Whetung ... just part of a shared life on his land’s lakes and rivers.” This co-existing and sharing of wild rice can be directly juxtaposed with the approach to cultivating wild rice in paddies. For instance, California farmers implement pest control mechanisms to prevent wildlife, such as birds, from enjoying the grains of wild rice. Pest control is implemented to maximize the amount of rice being cultivated purely for profit. Unlike locations like Pigeon Lake (where Whetung harvests wild rice), “non-human” consumers of wild rice (i.e., birds) are not welcome in the rice paddies of California.

41. DB Marcum & WP Gorenzel, “Grower Practices for Blackbird Control in Wild Rice in California” (1994), Proceedings of the Sixteenth Vertebrate Pest Conference 243. This paper involved a survey of twenty-nine people, representing 71 per cent of California’s wild rice growers in 1994.

42. *Ibid* at 245 and 247.

43. Oelke, *supra* note 14.

44. LaDuke, *supra* note 1 at 184–185.

45. Oelke, *supra* note 14.

46. “Wild Rice Concerns on Pigeon Lake” (2017), online: Save Pigeon Lake <<http://savepigeonlake.com>>

that has returned to the lake because it is impacting their recreational use of the lake. Some cottagers and homeowners have ripped up some of the wild rice, unbeknownst to the nearby First Nations community, who later came together in canoes to mourn the sacred seeds that were ripped out of Pigeon Lake.⁴⁷

Events and Western perspectives within both Canada and the United States have taken a toll on the health of wild rice, and as a result the health of the connection between Anishinaabeg and manoomin has declined. Without action, the future of wild rice in the GLR is murky, like the waters where wild rice will not take root and grow.

III GEOGRAPHICAL INDICATIONS

One approach to addressing the threats to the integrity of wild rice is through intellectual property (IP) regimes. In particular, geographical indications, or GIs, could provide an interesting approach to protecting wild rice in the GLR. Before applying GIs to wild rice, it is essential to understand what GIs are and how they are approached in Canada and the United States, since the GLR falls across the border of these two countries.

Article 22(1) of the *Agreement on Trade-Related Aspects of Intellectual Property Rights* defines GIs as “indications which identify a good as originating in the territory of a Member, or a region or locality in that territory, where a given quality, reputation or other characteristic of the good is essentially attributable to its geographical origin.”⁴⁸ Therefore, GIs seek to protect goods that have certain characteristics or qualities associated with a specific region.

According to the World Intellectual Property Organization (WIPO), a GI is not the same as a trademark:

[W]hereas a trademark identifies the enterprise which offers certain products or services on the market, a geographical indication identifies a geographical area in which one or several enterprises are located which produce the kind of product for which the geographical indication is used. Thus, there is no “owner” of a geographical indication in the sense that one person or enterprise can exclude other persons or enterprises from the use of a geographical indication, but each and every enterprise which is located in the area to which the geographical indication refers has the right to use the said indication for the products originating in the said area, but possibly subject to compliance with certain quality requirements ...⁴⁹

Essentially, by attaching a GI to a good, there is a reputation associated with a particular geographic region, and this indication prevents unauthorized users with a substandard

⁴⁷ J Nyznik, “Prayers, Song for Wild Rice Pulled from Lake,” *The Peterborough Examiner* (July 25, 2016), online: <<http://www.thepeterboroughexaminer.com/2016/07/25/prayers-song-for-wild-rice-pulled-from-lake>>

⁴⁸ *Agreement on Trade-Related Aspects of Intellectual Property Rights*, April 15, 1994, 1869 UNTS 299: 33 ILM 1197 at Art 22 [TRIPS].

⁴⁹ World Intellectual Property Organization, *WIPO Intellectual Property Handbook: Policy, Law and Use*, 2nd ed (Switzerland: WIPO, 2008) at 121 [WIPO].

product from passing off that product under the premise that it shares that region's reputation of quality.

According to Teshager Dagne, “[t]he place-based nature of GIs rights allows Indigenous Peoples and Local Communities (ILCs) to establish collective rights over traditional resources in a defined geographical area, without a need to identify particular rights holders.”⁵⁰ Additionally, GIs are “‘publicly-oriented’ rights that have particular relevance for preserving cultural heritage and conserving agricultural systems for multiple benefits.”⁵¹ The use of GIs has been popular in the European Union (EU) for quite some time, with the indications largely being associated with wine.⁵²

Meanwhile, the United States views GIs differently from that of the EU and does not distinguish GIs as being separate from trademarks:

It protects GIs through specific categories of the trademark regime: certification marks, collective marks and, in some cases, ordinary trademarks. GIs are protected through certification marks and collective marks in the United States as an exception to the general rule that individual trademarks must not be geographically descriptive without a showing of acquired distinctiveness.⁵³

The United States Patent and Trademark Office defines a certification mark as

[A]ny word, name, symbol, or device used by a party or parties other than the owner of the mark to certify some aspect of the third parties' goods/services. There are three types of certification marks used to indicate: 1) regional or other origin; 2) material, mode of manufacture, quality, accuracy or other characteristics of the goods/services; or 3) that the work or labor on the goods/services was performed by a member of a union or other organization.⁵⁴

Meanwhile, collective marks are:

[A] mark adopted by a “collective” (i.e., an association, union, cooperative, fraternal organization, or other organized collective group) for use only by its members, who in turn use the mark to identify their goods or services and distinguish them from those of non-members. The “collective” itself neither sells goods nor performs services under a collective trademark or collective service mark, but the collective may advertise or otherwise promote the goods or services sold or rendered by its members under the mark.⁵⁵

⁵⁰ TW Dagne, “The Identity of Geographical Indications and Their Relation to Traditional Knowledge in Intellectual Property Law” (2014) *IDEA* 54:2 255 at 264.

⁵¹ *Ibid* at 266–267.

⁵² TW Dagne, “Law and Policy on Intellectual Property, Traditional Knowledge and Development: Legally Protecting Creativity and Collective Rights in Traditional Knowledge Based Agricultural Products through Geographical Indications” (2010) 11:1 *Estey Centre Journal of International Law and Trade Policy* 68 at 79 [Dagne, “Law and Policy”].

⁵³ *Ibid* at 81.

⁵⁴ United States Patent and Trademark Office, “Geographical Indication Protection in the United States,” online: <https://www.uspto.gov/sites/default/files/web/offices/dcom/olia/globalip/pdf/gi_system.pdf>

⁵⁵ *Ibid*.

Finally for this paper, it is crucial to understand Canada's approach to implementing GIs. With Canada signing the Comprehensive Economic and Trade Agreement (CETA) in 2016, Canada's approach toward GIs will expand, considering that prior to CETA Canada's GI protections only extended to wines and spirits.⁵⁶ The signing of CETA has resulted in amendments to the *Trade-marks Act*, such as replacing the definition of geographical indication to read as follows:

[G]eographical indication means an indication that identifies a wine or spirit, or an agricultural product or food of a category set out in the schedule, as originating in the territory of a WTO Member, or a region or locality of that territory, if a quality, reputation or other characteristic of the wine or spirit or the agricultural product or food is essentially attributable to its geographical origin.⁵⁷

This alteration of the *Trade-marks Act* in Canada provides more opportunities for a variety of Canadian goods, such as wild rice, for example, to gain protection based on their quality, reputation, or other characteristic associated with its geographical origin. Despite the amendments to the *Trade-marks Act* that came into force on September 21, 2017,⁵⁸ there have not been any new Canadian GIs registered, so the existing GIs concern winery regions in Ontario and British Columbia and Canadian whiskey.⁵⁹ Interestingly, these amendments not only apply to the signing of CETA, but also to the *Canada–Korea Economic Growth and Prosperity Act*. Further, it raises “the possibility for any country to protect its GIs upon application to the designated minister. CETA itself opens the possibility for Canadian producers and associations to protect equivalent Canadian designations in Europe.”⁶⁰ A GI for GLR wild rice would be appealing to many consumers, who are increasingly concerned about the origins of the food on their plate, because it would provide transparency about the region and harvesting practices for the wild rice.⁶¹

⁵⁶ DGC Glover, T Qureshi, & J Johnson, “Cheese, Olives and Other Agricultural Products to Get Geographical Indication Protection under CETA,” (November 11, 2016), online (blog): <<https://www.canadiantechlawblog.com/2016/11/11/cheese-olives-and-other-agricultural-products-to-get-geographical-indication-protection-under-ceta/>>.

⁵⁷ Bill C-30, *An Act to implement the Comprehensive Economic and Trade Agreement between Canada and the European Union and its Member States and to provide for certain other measures*, 1st Sess, 42nd Parl, 2017 at para 60.

⁵⁸ C Wilson, “Say ‘Cheese’ . . . but Not ‘Taleggio Cheese’: CETA’s Impact on Geographical Indications in Canada” (October 2017), online: Norton Rose Fulbright (blog): <<http://www.nortonrosefulbright.com/files/ca-say-cheese-but-not-taleggio-cheese-cetas-impact-on-geographical-indications-in-canada-157820.PDF>>

⁵⁹ Canadian Intellectual Property Office, “List of Geographical Indications” (August 12, 2016), online: Government of Canada <<http://www.ic.gc.ca/cipo/listgiws.nsf/gimenu-eng?readform&sort=region&order=CA>>

⁶⁰ Wilson, *supra* note 58. See also *supra* note 59, which shows that there is a registered GI for “Icheon Rice” from Korea, showing that there is opportunity to register a GI for wild “rice” (which, as previously noted, is technically a cereal grain and not a type of rice).

⁶¹ R Watkin, “Placing Canadian Geographical Indications on the Map” (2018) 30:2 IPJ 271 at 282. (“Interest in origin-specific foods has been motivated by a reaction against the standardization of food products brought about by globalization. Food initiatives, such as the ‘100-mile diet’ and the ‘slow food’ and ‘farm-to-fork’ movements have increased the demand for locally produced agricultural products.”)

For Anishinaabeg communities living in the GLR, obtaining a GI for naturally cultivated wild rice would protect it from being exploited by corporations (like NorCal) seeking to genetically engineer and further patent wild rice. This is essential to preserving the very nature of wild rice: “To change wild rice is to change the Ojibwe. It is an integral part of their culture, diet, and spirituality. Wild rice is a gift from the Creator, and the Ojibwe do not think that it should be tampered with; they believe that no one has the right to change the gift the Creator has given them.”⁶² Pursuing a GI for wild rice would allow the Anishinaabeg communities to determine what qualities are required for wild rice to use this GI.

However, the implementation of a GI is not without challenges. As I will discuss in section IV, there are a number of issues in terms of legal formalities and incompatibility with Indigenous perspectives.

IV APPLYING GEOGRAPHICAL INDICATORS TO WILD RICE

The fact that GIs protect goods like agricultural goods according to a quality, reputation, or other characteristic that is derived from its place of geographical origin makes this IP regime attractive for wild rice—especially when taking Traditional Knowledge and its ecological significance into account. By applying the principles within Article 22(1) of TRIPS, we can get a general idea of what a GI for wild rice could look like.

First, the GI would consist of wild rice (*Z. palustris*), which naturally grows in the GLR. Because this paper is examining how GIs could help revitalize wild rice ecosystems, it should be noted that by “naturally grows” I mean that it is not cultivated in a rice paddy. This distinction is important, since there are rice paddies in Minnesota, as mentioned previously. By having this requirement for it to be grown in a natural lake, river, or wetland, there is a definitive characteristic about the rice. By allowing it to grow in these environments, it is living up to its name of “wild” rice. Furthermore, wild rice is typically associated with the GLR, and it is something harvested from lakes—not farm fields.⁶³ When wild rice is harvested from a lake, it is *typically* harvested in a more traditional manner and in accordance with Anishinaabeg traditional practices.⁶⁴ The harvesting practices for rice paddies are not in line with an ecologically friendly process.⁶⁵ So, based on this break down, a GI for GLR wild rice would be identifiable by its quality, reputation, *and* characteristic (based on specific natural cultivation).

^{62.} J Siebert & G Johnson, “Should We Genetically Engineer Wild Rice?” at 71, online: Minds at UW <<https://minds.wiscconsin.edu/bitstream/handle/1793/75918/Should%20We%20Genetically%20Engineer%20Wild%20Rice%20by%20Josef%20Siebert.pdf?sequence=10>>

^{63.} See LaDuke, *supra* note 1 at 173. See also the American case *Wabizii v Busch Agricultural Resources* from 1988 for a lawsuit filed against Busch Agricultural Resources for false and misleading advertising. Their California-grown paddy product, “Onamia Wild Rice,” was disguised as “authentic” Minnesota lake rice.

^{64.} It should be noted that airboats with skimmers can be used to collect wild rice; not everyone is going out in a canoe with a stick to knock the rice off its stalks.

^{65.} DB Marcum, KM Klonsky, & P Livingstom, “Sample Costs to Establish and Produce Wild Rice” (2005) University of California-Cooperative Extension at 5. The harvesting practices in California typically involve the following: “Paddies are drained a few days to a week before harvest to allow soils to provide better footing for the combine. The wild rice is usually custom harvested because fields are small and harvesting equipment is costly.”

However, implementing a GI for wild rice in the GLR is not this simple, because the wild rice is growing in Canada *and* the United States. While Bill C-30 will align Canada's approach to GIs with that of TRIPS, the United States does not have any such legislation in place. Having all wild rice within the GLR incorporated into a GI is important because it ensures that Anishinaabeg communities on either side of the border will benefit from having this grain protected. It will also protect aquatic ecosystems that are interconnected in the region—regardless of borders.

To address this multi-state issue, there are a couple of approaches that can be taken. One option is to establish a bilateral agreement between Canada and the United States. According to the WIPO:

In general, such bilateral agreements consist of lists of geographical indications which were drawn up by the contracting parties and an undertaking to protect the geographical indications of the respective contracting parties. The agreement usually also specifies the kind of protection that is to be granted. Although in general useful, bilateral agreements cannot constitute an entirely adequate solution to the problem of the lack of international protection because of the multiplicity of negotiations required and, resulting therefrom, an inevitable diversity of standards.⁶⁶

So, while this is appealing in the sense that it can provide clarity on what the protections under a wild rice GI would entail, there is still the issue of differing standards (i.e., Canada's amendments to the *Trade-marks Act* compared to no GIs in the United States).

One way to alleviate this is to have separate but similar GI protections that coordinate with each respective nation's IP laws. For example, Bill C-30 will allow wild rice to fall under GI protection as an agricultural product in Canada. Meanwhile, an option in the United States is to implement a certification mark to indicate region or other origin, material, mode of manufacture, *quality*, accuracy, or *other characteristics* of the goods/services. The implementation of this GI across two North American countries is definitely the largest hurdle to be met for wild rice.

Despite this challenge, Dagne notes the following:

Even in cases where a good which is a likely candidate for GI protection is found across the territories of two or more states, the respective states have found ways to work together to allow joint registration of GI rights. The presence of a resource and the accompanying knowledge in two or more than two states that have a common interest to preserve these resources will not be a problem as such if they adopt GIs as part of an overall strategy to protect traditional knowledge.⁶⁷

Preserving wild rice and its natural habitats, while also ensuring that traditional practices and Traditional Knowledge are not lost due to lost ties to the land, are goals that developed countries like Canada and the United States should be striving to achieve.

⁶⁶. WIPO, *supra* note 49 at 129.

⁶⁷. Dagne, "Law and Policy," *supra* note 52 at 95–96.

It is important to note that the use of GIs to protect wild rice may be viewed as problematic from an Indigenous perspective because the Western intellectual property law regime seeks to prevent “unauthorized commercial exploitation” and “is used in the West to organize markets, not suppress them.”⁶⁸ Because Traditional Knowledge is essential to the revitalization of wild rice through sharing knowledge of how to care for the rice and the aquatic system, the concerns of implementing a Western intellectual property regime cannot be ignored.

As mentioned previously, Traditional Knowledge is a community-held knowledge and is unique for every Indigenous community. The experiences with the land and with each other develops that knowledge, meaning there is no pan-Traditional Knowledge for Anishinaabeg groups located across Canada and the United States. This leads to the first issue of determining who will establish the GI for wild rice, as there will be many multi-jurisdictional Anishinaabeg stakeholders with different values/interests. The United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) calls for a recognition of the rights of Indigenous peoples within a signatory’s jurisdiction. In particular, Article 31.1 states the following:

Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games and visual and performing arts. They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions.⁶⁹

With this in mind, communities need to be able to manage their resources in a manner that benefits them while also being able to uphold their Traditional Knowledge practices. Unless there is careful planning, conflict and dispute may arise from an attempt to place a Western intellectual property tool on a plant species that is widely held to be sacred and culturally significant. One possibility to avoid/resolve this conflict is for Indigenous communities interested in establishing a GI for wild rice to collaborate on determining the qualities and parameters of a wild rice GI.⁷⁰

⁶⁸ D Gervais, “Traditional Knowledge: Are We Closer to the Answer(s)? The Potential Role for Geographical Indications” (2009) 15:2 ILSA J Int’l & Comp L 551 at 555.

⁶⁹ United Nations Declaration on the Rights of Indigenous Peoples, GA Res 295, UNGAOR, 61st Sess, Supp No 49, UN Doc A/RES/61/295, 46 ILM 1013 (2007) at Art 31.1. [UNDRIP]

⁷⁰ This is not a revolutionary concept, as the Anishinaabeg have a history that spans centuries of building relationships through treaties. For example, there is the Dish with One Spoon Treaty between the Anishinaabeg and the Haudensaunee regarding a shared responsibility for the land. See VP Lytwyn, “A Dish with One Spoon: The Shared Hunting Grounds Agreement in the Great Lakes and St. Lawrence Valley Region,” in *Papers of the Twenty-Eighth Algonquian Conference* (Winnipeg: University of Manitoba, 1997) at 210. See also S van der Porten, RC de Loë, & D McGregor, “Incorporating Indigenous Knowledge Systems into Collaborative Governance for Water: Challenges and Opportunities” (2016) 50:1 Journal of Canadian Studies 214. (In this article, the authors provide suggestions for reconciling collaborative approaches to water governance with Indigenous knowledge systems and the values and perspectives of Indigenous peoples, which is interesting to consider when developing an intellectual property governance model for wild rice.)

Because GIs serve to protect products of a distinctive region and quality from unauthorized commercial exploitation, this reveals that a protected product is intended to be commercially exploited. With wild rice being viewed as a sacred seed by the Anishinaabeg, it seems problematic to implement a GI regime so that it can be commercially exploited. With Articles 31.1 and Article 32 of UNDRIP emphasizing that Indigenous peoples have the right to maintain, develop, and control their Traditional Knowledge and the development and use of their lands and territories and other resources,⁷¹ certain Anishinaabeg groups within the GLR may strongly oppose placing a commercial value on manoomin, seeing it as an exploitation of the Creator's gift, which in turn could be viewed as exploiting their identity.⁷² However, in communities like Curve Lake First Nation, James Whetung's business Black Duck Wild Rice has served as a means of reconnecting his community with the Traditional Knowledge of harvesting wild rice, while also selling the wild rice locally.⁷³ Therefore, only these Anishinaabeg communities are able to determine whether wild rice in their territory ought to be commercialized, and if a community wishes to use their Traditional Knowledge as a means of establishing a GI to introduce consumers to the authentic form of wild rice, then that community has the right to make that determination.

For a GI to be successful, the process of developing a wild rice GI needs to be in control of Anishinaabeg peoples so that they can determine how this Western legal concept will impact their relationship with the wild rice and how their Traditional Knowledges will apply. Furthermore, "the TRIPS Agreement does not prescribe a particular legal means to carry out the obligations. Thus, members are at their discretion to choose the particular legal means to provide for the protection of GIs."⁷⁴ Because there is no prescribed approach to carry out GI obligations, this brings forward an opportunity to have Indigenous Knowledge Governance shape the way wild rice is managed and harvested to comply with the GI.

While the initial establishment of an all-encompassing GI for the GLR is definitely a challenge, embracing this IP regime to protect wild rice would create several positive outcomes for the future of this grain and the people who depend on it. First, the most important promise GIs offer to Indigenous peoples and local communities relates to their potential to recognize and reward producers for their long-lived cultural contributions to livelihood, conservation, lateral learning, and social networking by adding premium value to their products.⁷⁵ By embracing a GI in the GLR, it would be acknowledging the Anishinaabeg, who are the original harvesters of wild rice, and it would be celebrating their harvesting practices, which are far superior in terms of being sustainable and ecologically mindful.

Additionally, "GIs signify added value and specific qualities of a product from a region by enabling producers to differentiate their products based on criteria attractive to consumers, such as the sustainability or traditional nature of production. Consumers are now looking for quality products ... and they are influenced by their social conscience when choosing products."⁷⁶ While implementing a GI will not make wild rice paddies necessarily disappear, a GI would educate consumers about the difference in harvesting quality—in terms of being

⁷¹ UNDRIP, *supra* note 69 at Art 31–32.

⁷² Siebert & Johnson, *supra* note 62.

⁷³ "Indian & Cowboy," *supra* note 26.

⁷⁴ Dagne, "Law and Policy" *supra* note 52 at 78.

⁷⁵ *Ibid* at 86.

⁷⁶ *Ibid* at 88.

more sustainable and having a lower ecological impact—and would reveal that the GLR has a unique grain whose flourishing improves the ecosystem and the well-being of the region's First Nations communities. Through this education, it is also possible that disputes (like the one occurring at Pigeon Lake) could be resolved and community members would develop an appreciation for the highly nutritious wild rice that has been in the region for ages.

Furthermore, there are economic benefits for individuals and community groups who “subscribe to the traditional practices belonging to the culture of that community. In this regard, GIs serve as a factor of ‘mobilisation’ for local communities. It is a widely held view that the mobilisation of local communities is essential in achieving the sustainable management of local resources.”⁷⁷ By embracing the traditional practices of harvesting wild rice, and promoting the use of healthy lakes and rivers, there can be a revitalization in the wild rice stock and, in turn, a revitalization in the harvesting of it.

V CONCLUSION

Wild rice should taste like a lake,⁷⁸ channelling the nutrients and healthy components from its environment. But not all wild rice grains are cultivated equally. Wild rice that is grown in natural lakes and rivers within the Great Lakes region is far superior to “wild” rice that is grown in a flooded field. True wild rice contributes to a healthy ecosystem, nurtures and encourages Anishinaabeg traditional practices, and tastes better. Through the adoption of a geographical indication for wild rice in the GLR, combined with the Indigenous knowledge governance of this grain, the legacy as well as the natural habitat of wild rice can be revitalized by recognizing the value of the grain's cultural and ecological origin. While implementing a GI may not be a flawless process, it provides an opportunity to celebrate and recognize the ecological and cultural elements that make the wild rice from the Great Lakes region so special.⁷⁹

^{77.} *Ibid* at 91.

^{78.} LaDuke, *supra* note 1.

^{79.} I want to acknowledge and thank James Whetung for first introducing me to the issues surrounding wild rice in the Great Lakes region during my undergraduate studies at Trent University. The sharing of his knowledge and experiences with revitalizing wild rice within the traditional territory of Curve Lake First Nation left me wondering about what it would take to make opposing cottagers recognize the ecological, cultural, and spiritual significance of this local delicacy. This issue drove me to explore how Western intellectual property, in the hands of Indigenous peoples, could strive to bring awareness to this distinctive grain and, in turn, protect it in its natural ecoregion. James Whetung: Keep on ricing, and keep giving the rice a voice.